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ABSTRACT

This volume of Colorado special education administrative decisions contains all Impartial Hearing Officer Decisions, State Level Review Decisions, and Complaint Findings issued since 1988. The full text of each decision or finding is preceded by a case summary which includes a listing of key topics, a statement of the issues, the decision, and highlights of the discussion. An index is provided which lists the decisions and findings by key topics. The text is divided into two sections, one for due process decisions and one for complaint findings. Within each section the cases are in numerical order based on the date the hearing request was made or complaint was filed. The cases deal with procedural safeguards, due process hearings, extended school year, discipline, free appropriate public education, private schools, least restrictive environment, student evaluation, confidentiality of information, related services, individual educational plan, attorney fees, health-related issues, qualified instructional personnel, and graduation and exit. (JDD)

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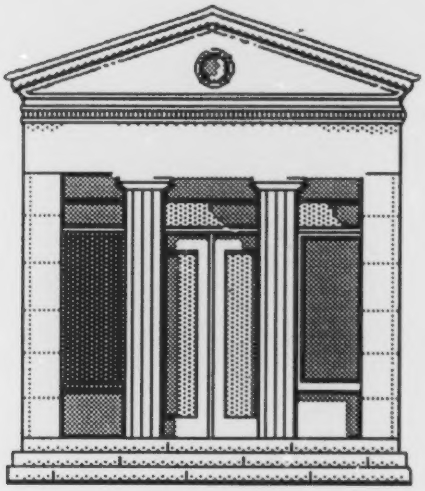
COLORADO
SPECIAL EDUCATION ADMINISTRATIVE DECISIONS



IMPARTIAL HEARING OFFICER DECISIONS

STATE LEVEL REVIEW DECISIONS

FEDERAL COMPLAINT FINDINGS

EC 300336

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INTRODUCTION

Colorado Special Education Administrative Decisions contains all Impartial Hearing Officer Decisions, State Level Review Decisions, and Complaint Findings issued since 1988. The document is a resource tool for special education directors, impartial hearing officers, advocates, attorneys and others involved in assuring the provision of a free appropriate public education to children with disabilities in Colorado. Materials will be updated on a periodic basis by the Special Education Services Unit of the Colorado Department of Education.

The full text of each decision or finding is preceded by a case summary which includes a listing of key topics, a statement of the issues, the decision and highlights of the discussion. Additionally, an index is provided which lists the decisions and findings by key topics.

The documents are divided into due process and complaint documents. Within each section the documents are in numerical order based on the date a request for a due process hearing is made or a complaint is filed. Impartial Hearing Officer Decisions, State Level Review Decisions and any supplementary decisions on the same case are filed together. Impartial Hearing Officer decision numbers are designated with an "L", followed by the year of request and a number beginning with "100" that designates the chronological order in which the request was received by the Colorado Department of Education within a particular year, for example "L88:100". A State Level Review Decision in the case would contain the same number except be preceded by an "S", for example "S88:100". Complaint findings are listed by the year and a number beginning with "501" that designates the chronological order in which the complaint was filed with the Colorado Department of Education within a particular year, for example "88:501".

It is intended that the materials contained in these volumes be used for information and guidance by those involved in the provision and administration of special education programs. The materials do not necessarily reflect the current administrative positions of the Colorado Department of Education.

ACKNOWLEDGEMENT

Compilation of these materials and creation of this document was possible thanks to the efforts of Cheryl Karstaedt, Special Assistant for Federal Programs, and Wendy Dixon, Word Processing Supervisor, Special Education Services Unit, Office of Federal/State Programs and Services.

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Case Number: L88:100

Status: Impartial Hearing Officer Decision

Key Topics:
Placement
Free Appropriate Public Education (FAPE)
Stay-Put Provision
Authority of Hearing Officer

Issues:

- What is the student's current placement?
- Has the district offered the student a FAPE?
- Effect of prior complaint findings on same issue.

Decision:

- Child should be educated in a highly structured therapeutic environment where he is exposed to non-handicapped students.
- Such a setting can be created in home school or through tuitioning to another district.
- Hearing officer has authority to decide current placement even though the issue has been addressed by complaints officer of CDE pursuant to a federal complaint.
- Child's current placement was elementary school self-contained classroom.
- Current IEP does not offer FAPE as it does not insure student will be educated with non-handicapped students to the maximum extent appropriate.

Discussion:

- Child's educational history.
- Discipline issues with child.
- Parent not advised of rights.
- Alternative placement possibilities.
- IEP reasonably calculated to provide educational benefit to student.

Case Number: L88:100
Cont'd

- Summarizes expert testimony regarding student's assessments.
- Parent's due process request not honored and student refused admittance to school but offered tutoring services.
- Benefit of interaction with non-handicapped students.

SEP 1 1988

NDERSON, JOHNSO

In re the Matter of:

WOODLAND PARK SCHOOL DISTRICT
RE-2,

Petitioner

v.

[redacted],

By and through his parents

[redacted],

Respondents.

FINDINGS AND DECISION
of
Impartial Hearing Officer
Joseph M. Goldhammer

Case #: L88:100

I.

INTRODUCTORY STATEMENT

THE HEARING was held on August 11 and 12, 1988 at Gateway School in Woodland Park, Colorado. Jurisdiction is conferred by 20 U.S.C. §1415, 34 C.F.R. §300 et seq. and Part VII of the current Colorado Department of Education State Plan. The Petitioner was represented by Mr. Michael J. Gianunzio of Anderson, Johnson & Gianunzio, 104 S. Cascade Ave., Suite 204, Colorado Springs, Colorado 80903. The Respondents were represented by M. Claire Williamson and Randy Chapman of The Legal Center, 455 Sherman St., Suite 130, Denver, Colorado 80203.

The hearing was held pursuant to a request by the Petitioner for hearing submitted June 15, 1988. Petitioner requested a hearing on two issues: (1) what is [redacted] current educational placement under 20 U.S.C. §1415(e)?; and (2) has the petitioner offered [redacted] a free appropriat

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education under the Education of the Handicapped Act, 20 U.S.C. §1400 et seq? The respondents challenged the hearing officer's authority to hear the first of those issues and filed a brief dated July 28, 1988 opposing petitioner's request to place in issue [redacted] current educational placement. At the outset of the hearing, the hearing officer ruled that he would accept evidence on that issue. The parties stipulated into the record in this case the briefs and attachments thereto filed July 28, 1988 on this issue.

Section VII.B.2. of the current state plan provides that a decision must be reached and mailed within 45 days after receipt of the request for hearing. Section VII.B.2.f. provides that the parties may agree that the time to reach a decision and mail findings may be extended up to an additional 45 days. The parties agreed on the record at the hearing upon the extension for an additional 45 days.

II.

FINDINGS OF FACT

The hearing officer makes the following findings of fact based upon the evidence addressed at the hearing:

1. Dean Reedy is currently 9 years old and lives with his parents, [redacted], in Divide, Colorado.

2. The [redacted] family moved from Wantagh, New York to Divide, Colorado in mid-September, 1987.

3. In New York, [redacted] attended a small special education class in the Wantagh Public School District. The class was taught by a special educator and a teacher assistant. [redacted] was mainstreamed in lunch and recreation. (Ex. A).

4. In April, 1987, [redacted] began to experience negative side effects from the drug Ritalin, and that medication was discontinued and others were explored. From April, 1987 through the end of the school year [redacted] received home tutoring from the Wantagh Union Free School District rather than attending school. (Ex. 17).

5. [redacted] was enrolled in the Woodland Park Elementary School on October 29, 1987. (Ex. R). He was placed in the special education class taught by Charmaine Thaner. [redacted] was one of eleven students enrolled in that classroom. Four of those students remained in the classroom for three or more hours per day and therefore were "self-contained students." The other students came in and out of the classroom for various purposes at various times of the day and were called "resource students." Woodland Park Elementary School is now called Gateway Elementary School and will be referred to interchangeably by both names throughout this document.

6. [redacted] was assigned to home room teacher [redacted]. [redacted] was directed to go to [redacted] room for attendance at the beginning of the day and to be excused at the end of the day, a total of approximately 15 minutes. [redacted] was also mainstreamed with other students in the school for lunch and recess. [redacted] was not mainstreamed for physical education. Other than [redacted] time in [redacted] home room, lunch, and recess, [redacted] spent [redacted] entire school day in [redacted] special education classroom.

7. On October 29, the first day of school, [redacted] exhibited some non-compliant and disruptive behaviors in the classroom. [redacted] refused to follow [redacted] directions, yelled and screamed in the classroom, and inappropriately questioned [redacted] mother for talking to [redacted].

8. Between October 29, 1987 and November 23, 1987 inclusive there were seventeen school days. [redacted] was absent on four of those days and attended school on the other thirteen. Of the thirteen days [redacted] attended school [redacted] was late on five days. [redacted] mother explained that [redacted] was often late during this period because new medications were being explored for [redacted] and [redacted] often could not sleep at night and it was difficult for [redacted] to get up in the morning.

9. Of the thirteen days that [redacted] attended school referred

to in the preceding paragraph, Charmaine Thaner reported that he exhibited disruptive behavior similar to that experienced on October 29 on approximately five of those days. On approximately November 12, 1987 [redacted] ran from the special education classroom after a disagreement between him and his sister and ran to the parking lot and hid underneath his mother's car. [redacted] also expressed to his teacher that he wished a truck would come crashing into the classroom and there would be a fire with people screaming.

10. Charmaine Thaner noted no particular problems with [redacted] on eight of the thirteen days he was in her classroom through November 23, 1987.

11. Charmaine Thaner developed two discipline plans for [redacted]. The plans set forth procedures to be followed in the event [redacted] became disruptive. (Exs. 2 and 3).

12. On November 24, 1987 the school district in cooperation with the Pikes Peak Board of Educational Services conducted a staffing and drafted an individual educational plan for [redacted]. In accordance with that plan, [redacted] was continued in his then current educational placement in the special education resource room at Woodland Park Elementary School. He was mainstreamed in his home room at the beginning and at the end of the day and was also mainstreamed for lunch and recess. The

drafter of the plan, [redacted] a school psychologist, noted that [redacted] was being considered for mainstreaming in physical education and music. The individual education plan (Ex. 4) noted some problems with [redacted] comportment but they were not sufficient to warrant a change in [redacted] placement at that time.

13. [redacted] handicapping condition in Exhibit 4 was identified as perceptual communicative disorder.

14. At the staffing of November 24, 1987, [redacted] attended, and agreed to [redacted] placement in the special education classroom.

15. After the staffing on November 24, 1987, during the lunch recess period, [redacted] was chasing, kissing and grabbing girls on the playground.

16. On November 25, 1988, again during recess after lunch, [redacted] was grabbing girls in the crotch area as they played on a climbing apparatus on the playground. One girl climbed to the top of the climbing apparatus and [redacted] pulled her feet and she fell to the ground. [redacted] then fell on top of her, grabbing her crotch. A playground supervisor, [redacted], then pulled the girl away. [redacted] refused to come in from the playground. [redacted] was finally coaxed from the playground and into the principal's office. [redacted] sat on the floor yelling and saying that [redacted] wanted to commit

suicide.

17. While there were no highly visible incidents during lunch itself, [redacted] spent much of his time socializing with girls and as a result failed to eat his lunch.

18. On November 30, 1987, school officials again encountered discipline problems with [redacted] in the form of shouting at school officials, kicking bathroom doors, and pushing over desks. He laid across another student's desk and started cutting his assigned papers. He was in a very agitated state. He made a suicide gesture, holding a pair of scissors to his tongue as if to cut it but he stopped short of doing so.

19. At various times between October 29 and November 30, 1987 other students in the special education classroom were disrupted by [redacted] behavior. On November 30, 1987 these other students in the classroom were dismissed to their home rooms in an attempt to calm [redacted] down. Furthermore, at various times other students began to laugh and imitate [redacted] behavior.

20. December 1, 1987 was [redacted] last day at Woodland Park Elementary School prior to the hearing in this case. On that day, [redacted] was again noncompliant about doing his work, attempted to spray a teacher with a hair spray can, and left the school grounds at lunchtime after Mr. Christie spoke to him regarding

cursing at other children. [redacted] ran to a construction site adjacent to the school playground where he hid in a ditch. Charmaine Thaner called the police and [redacted] Finally, a police officer picked up [redacted] from the construction area. [redacted] arrived and she took [redacted] to the office. [redacted] was again talking about committing suicide. Both [redacted] and [redacted] were crying. [redacted] took [redacted] home.

21. [redacted] did not bring [redacted] back to school on December 2, 3, and 4 1987. However, the petitioner never formally suspended [redacted] from school at any time.

22. A new staffing was held on December 7, 1987. Among those present at the staffing were John Sansone, Director of Special Education for the Pikes Peak Board of Cooperative Educational Services, Charmaine Thaner, Alex Christie, the home room teacher, Rob Danin, the principal, [redacted], and William Brown a representative of the NEED program. A discussion was held concerning [redacted] repeated suicide threats, the incidents of his inappropriate sexual behavior, his cursing on the playground and running from the playground.

23. At the December 7 staffing, [redacted] handicap condition was identified as "TBD" which mean to be determined.

24. At the December 7 staffing, two placement alternatives

were offered [redacted]. One of those placements, Myron Stratton Home, is a residential facility for the emotionally disturbed. The other, the NEED program, a segregated day program, did not have elementary aged students until February, 1988. John Sansone testified that there was no discussion about retaining [redacted] in his then current placement at the staffing of December 7, 1987. Sansone testified that things were happening that made it difficult for [redacted] to stay at Woodland Park. Sansone further testified that [redacted] did not want [redacted] in the Myron Stratton Home nor at NEED. She wanted him to return to Woodland Park. Sansone testified that he told Rob Danin at the meeting that some educational program had to be provided to [redacted] and that he could not be left without any education. Sansone further testified that at the staffing he did not recall that [redacted] was advised of her right to have [redacted] continue at Woodland Park Elementary during the pendency of hearings regarding his placement. He testified that [redacted] did agree orally to homebound instruction at that time, but he did not have her sign a written statement agreeing to that homebound placement. The above testimony of John Sansone is credited.

25. Charmaine Thaner provided [redacted] with forms for requesting a hearing at the December 7 staffing. [redacted] requested a hearing regarding [redacted] placement and said request for hearing was received by the Pikes Peak Board of Cooperative Educational Services on December 10, 1987. (Ex. F).

26. At the end of the December 7, 1987 staffing, [redacted] [redacted] did not think that [redacted] could come back to Woodland Park, in spite of the stay-put provisions in the Education of the Handicapped Act. She agreed to homebound instruction for [redacted] [redacted] as an alternative to a placement in the Myron Stratton Home or no instruction at all. The petitioner had no intention of accepting [redacted] back to Woodland Park School at that time.

27. [redacted] was not represented by counsel at the December 7, 1987 staffing.

28. The District did undertake to find a homebound instructor for [redacted] within a reasonable amount of time and after the staffing of December 7, 1987. The District's staff's efforts were made in good faith but were hampered by circumstances beyond their control. (Ex. M).

29. Commencing on January 27, 1988, [redacted] was provided with one hour per day of homebound instruction with instructor Amy Fetters. [redacted] did not ratify homebound instruction as a placement by accepting tutoring services, given the fact that she did not have the option of returning [redacted] to Woodland Park Elementary School.

30. Despite [redacted] request for a hearing received by

the Pikes Peak BOCES on December 10, 1987, no hearing was held regarding the recommended placements in the December 7, 1987 staffing. John Sansone testified that it was an error not to have a new hearing pursuant to [redacted] request and that he would have no hesitation to do what needs to be done the next time. Mr. Sansone's testimony is credited in this regard. By failing to have a hearing within 45 days after the December 10, 1987 request for hearing, the petitioner violated the provisions of 20 U.S.C. §1415.

31. A new staffing was held on February 8, 1988 at the request of Claire Williamson, [redacted] new attorney. (See Ex. 7). At that staffing, [redacted] handicapping condition was identified as SIEBD, or Significant Identifiable Emotional or Behavioral Disorder. One placement alternative was proposed by the School District, that of the NEED school for day treatment care. The February 8, 1988 staffing summary contains the only written memorialization of [redacted] agreement to accept home tutoring. It states as follows:

> Mother does not agree to home tutoring; school states that at the last staffing that it was a consensus that [redacted] should go on home tutoring. It is not written in the last staffing report. Mother verbally agreed to home tutoring after being offered NEED or Myron Stratton Home. Woodland Park offers to continue home tutoring until hearing is scheduled. Also, Woodland Park has offered to provide services at NEED until such hearing takes place. [redacted] has requested time to decide if she wants to continue with homebound or go with NEED. Her preference is to have [redacted] at Woodland Park

Elementary School. Homebound will continue unless otherwise indicated.

(Ex. 7, p. 5b)

32. By February 8, 1988 the NEED program had established a program for elementary aged children.

33. On March 1, 1988, Woodland Park Elementary School adaptive PE teacher, Valerie Higgins, did an adaptive PE evaluation on [redacted] and concluded that adaptive PE services are not warranted at that time pending placement decisions. (Ex. L).

34. On February 11, 1988, Claire Williamson in behalf of [redacted] and [redacted] filed a complaint with the Federal Complaints Officer of the Colorado Department of Education under 20 U.S.C. §1221e-3(a)(1) and the Education Department General Administrative Regulations found at 34 C.F.R. 76.780-783 claiming that the District failed to assess [redacted] adequately to determine his handicapping condition and failed to maintain [redacted] in his current placement pending the outcome of a hearing at the Woodland Park Elementary School and that such conduct on the part of the School District denied [redacted] a free, appropriate education. (See. Ex. B attached to Memorandum of Claire Williamson of July 28, 1988).

35. On May 24, 1988, Cheryl M. Karstaedt, made findings and recommendations with respect to the federal complaint of February

11, 1988. She found, inter alia, that the petitioner and the BOCES violated [redacted] right to a free appropriate public education by failing to maintain his current educational placement (the Woodland Park Elementary School special educational resource room) pending the outcome of the requested due process hearing. (Ex. M).

36. On June 10, 1988, the petitioner appealed the decision of the federal complaints officer, contending that the last placement agreed upon by the parties for this student was homebound instruction. (Ex. E attached to Memorandum submitted by Claire Williamson of July 28, 1988).

37. No decision had been reached upon said appeal at the time of the hearing in this case. (Stipulation of the parties at the hearing on the record).

38. [redacted] received homebound instruction from January 27, 1988 through approximately August 7, 1988 at the expense of petitioner.

39. [redacted] was evaluated at the John F. Kennedy Child Development Center at the University of Colorado Health Sciences Center, Denver, Colorado by a psychologist, social worker, educator, and pediatrician during March and April, 1988. All reports except the social worker's report were entered into the

record as Exhibit 9.

40. A new staffing was held and a staffing summary and individual educational plan was drafted on June 7, 1988. At that staffing the handicapping condition of [redacted] was found to be Significant Identifiable Emotional or Behavioral Disorders. (SIEBD). (Ex. 10). [redacted] was offered one placement alternative, the NEED program for day treatment. [redacted] was present at the June 7, 1988 staffing with counsel and disagreed with the proposed placement by the School District.

41. It is anticipated that the NEED program will have three elementary aged students, not including [redacted], during the next academic year. Two of those students are fifth graders and one is a second grader. (Testimony of John Sansone).

42. On June 15, 1988, the School District requested the hearing which was held on August 11 and 12 in this case.

43. Charmaine Thaner contacted various school districts in the Pikes Peak area to determine if they had self-contained EBD programs for elementary students in regular elementary schools and, if so, whether those districts would accept [redacted] if the petitioner would pay his tuition. While several of the districts had such classes, none could assure Ms. Thaner that an out-of-district student could be tuitioned in for next year.

(See Ex. 11).

44. [redacted] made substantial academic progress with his individual tutor in homebound instruction in the spring of 1988 and was generally not resistant to learning. However, in the summer months, [redacted] was resistant as he expressed his desire to have a summer vacation like all other children. On July 20, 1988, Amy Fetters drove to [redacted] home but he had sneaked out. His last two sessions were cancelled because [redacted] told Amy Fetters that [redacted] did not want further help. Amy Fetters testified that [redacted] is capable of learning when he is paying attention and when he is involved in a structured program. She stated that homebound instruction was not sufficiently structured because there was no negative reinforcement or consequences for his failure to cooperate. Ms. Fetters opined that [redacted] could benefit from exposure to non-handicapped children. Amy Fetters' testimony is credited in this regard.

45. Charmaine Thaner anticipates that she will have six self-contained students in the special education classroom at Gateway Elementary School beginning in September 1988. (Ex. 1). There will be one special education teacher for those students, Charmaine Thaner. Charmaine Thaner is not specifically certificated to teach emotionally disturbed students but she is able to serve them so long as no more than 50% of her students are from her non-certificated areas.

46. There are no personnel at the Gateway Elementary School trained for crisis intervention, to deal with a student's behavior which is extremely disruptive or which poses a safety threat to himself or other students.

47. [redacted] was slated to attend Golden Bell Ranch Camp in Divide, Colorado for two separate weeks in the summer of 1988. The first of those weeks beginning June 25, 1988 was successful and [redacted] generally participated with other campers in various activities. His camp counsellor, Alan Palmer, noticed that he had trouble waking up in the morning. Palmer observed back and forth movements with [redacted] head early in the morning. He also noticed that [redacted] was mesmerized by petting a stray dog. He further noticed that [redacted] sought privacy and made noises in private locations. After a week's hiatus, [redacted] returned to Golden Bell Camp but did not complete the second week after he was found jumping on a bed. [redacted] parents picked him up during the midst of that second week. The other children at the camp were non-handicapped children.

48. The NEED program is a day treatment program in Colorado Springs, Colorado for children with emotional or behavioral disorders ages seven through nineteen years. It has a total of forty to forty-five students only three of which are in the elementary grades. It is a structured program with clear rules

and clear consequences for breaking the rules. There are predictable rewards for compliance with the rules of the school. Children learn in small groups where the ratio of children to staff is one to two or one to three. There is a point system for good behavior. The school is a distance of one hour to one hour and fifteen minutes by bus from [redacted] home in Divide, Colorado. The school has personnel trained for crisis intervention. There are no non-handicapped children at the NEED program and there is no mainstreaming on campus. Mainstreaming is confined to after school activities such as boy scouts, intramural sports programs, etc.

49. The individualized educational program developed at the staffing of June 7, 1988, is reasonably calculated to enable [redacted] to receive educational benefits.

50. The teaching staff at the NEED program has a temporary certification to teach emotional or behavioral disordered students while they are doing their work toward a masters degree at the University of Colorado, Colorado Springs. They do not have a regular certification to teach SIEBD students.

51. Catherine Bergin, Assistant Superintendent for Business Services of the petitioner School District, testified that funds are not crucial in the School District's determination that [redacted] should be placed in the NEED program. She testified that

[redacted] was placed in the NEED program because it did not make sense to duplicate that program at Gateway Elementary School. The teachers at NEED have more experience in training in the education of SIEBD students. She testified that in her opinion, it was not necessary to recreate the NEED program at Gateway Elementary School.

52. Principal Rob Danin testified that if [redacted] attended the NEED program he would try to include [redacted] in after school intramural sports programs at Gateway Elementary School.

53. Several expert witnesses testified at the hearing as follows:

A. Dr. Judith Ashkanazi Reaven, staff psychologist at the JFK Center, testified that it was the JFK team consensus that [redacted] needed a highly structured and therapeutic program. She testified that [redacted] has significant emotional and behavioral problems. She further testified that the NEED program closely fits his needs, but that her only source of information on the NEED program was school personnel. She recommended intensive psychotherapy for [redacted] at least once per week. She further testified that [redacted] should be exposed to non-handicapped children. She testified that while [redacted] needs a structured and therapeutic program, this does not have to occur in a segregated setting so long as he is supervised by someone who is trained to deal with the emotional outbursts of a student like [redacted].

B. Dr. Allen Stage, a pediatrician and another member of the JFK evaluation team, is a pediatrician licensed to practice in the State of Colorado. Dr. Stage testified that he had diagnosed [redacted] as having Tourette Syndrome. He described Tourette Syndrome as involving tics or involuntary muscular contractions which are suppressible for awhile but which eventually must manifest themselves. Those afflicted with Tourette Syndrome often display grunts, growls, and profanities at inappropriate times. The onset of the disease is often between the ages of three and six years. Periods of stress exacerbate symptoms. One of the symptoms of the disease is a short attention span. The drug Ritalin often exacerbates the symptoms of Tourette Syndrome. The victims of Tourette Syndrome often interrupt their patterns of speech at unexplainable times with laughter and yelling. Children with Tourette Syndrome must be allowed to move about freely and to release their symptoms in a private or semiprivate area to which they can resort. Dr. Stage testified that [redacted] suicidal threats and gestures should be taken seriously and that he needs to be near crisis intervention. Dr. Stage testified that [redacted] needs a structured and therapeutic environment and that based upon his indirect knowledge of the NEED program, [redacted] would benefit from that program. However, he stated that JFK does not recommend a specific location and that [redacted] needs a highly structured therapeutic environment in a self-contained classroom setting.

C. Mr. William Brown, a social worker with a masters degree in social work with the NEED center, testified that he had recommended hospitalization for [redacted] to analyze his chemical makeup. Mr. Brown would not recommend any mainstreaming. At the present time, Mr. Brown does not recommend hospitalization but he does recommend the highly structured mental health setting for diagnosis on a short terms six week plan or a long term plan at the NEED center. [redacted] did not cooperate with Mr. Brown when Mr. Brown attempted an assessment in December, 1987.

D. School psychologist, Keith B. Marcantel, evaluated [redacted] in November, 1987. In his report of November 24, 1987 (Ex. 20) Mr. Marcantel recommends a highly structured education program with consistent use of consequences for his actions. That highly structured program would include new concepts being presented to him during short frequent presentations, a reward system for completion of work within time limits, and a shielding of [redacted] from distractions. In his testimony, Marcantel currently recommended placement in the NEED program for [redacted]. Furthermore, Marcantel opined that [redacted] suicide threats should be taken very seriously.

E. James E. Martin, Ph. D., an associate professor at the University of Colorado Springs never saw [redacted]. He reviewed a number of the exhibits in the case to formulate his opinions. Dr. Martin recommended the implementation of a behavior management plan with clear rules and clear consequences for compliance with or violation of the rules. Dr. Martin recommended a highly structured program with backup for crisis intervention. Dr. Martin recommended that this educational program be implemented in an integrated setting with non-handicapped students, because his self-image would be improved by such integration. Dr. Martin testified that the best option for Dean would be if resources for a highly structured program were available in his home school. If not, other grade schools in other districts should be looked to.

F. Lee Swanson, Ph. D. and full professor at the University of Northern Colorado testified that he also never saw [redacted] but opined based upon his examination of numerous exhibits in the case. Dr. Swanson opined that [redacted] should be mainstreamed because his exposure to non-handicapped children would provide him a model for behavior. Dr. Swanson testified that [redacted] suicidal threats were an attention-getting mechanism. Dr. Swanson testified that [redacted] would benefit by participating in the NEED program, but would benefit more from participating in a highly structured program in an integrated setting.

54. Based upon the above testimony, the hearing officer finds that [redacted] should be educated in a highly structured therapeutic environment where he can be closely supervised and

there is a small student to staff ratio. Crisis intervention should be available. This type of education is being provided to students similar to [redacted] in an integrated setting. It would be of educational benefit to [redacted] if this type of education were provided in a setting where [redacted] could be exposed to non-handicapped children. Such children would provide positive role models for [redacted], would improve his self-image, and would help acclimate him to a normal life environment.

55. Based upon the evidence presented at the hearing, it is the finding of the hearing officer that a highly structured therapeutic environment is not currently available in the special education resource room at Gateway Elementary School.

56. There was no evidence at the hearing, however, that the School District lacked the financial resources to provide [redacted] with a structured and therapeutic environment for his education in an integrated setting, either by creating such a setting in the Gateway Elementary School or by tuitioning [redacted] out to such a setting in another school district. It is feasible for the petitioner to provide [redacted] with the education he needs in a self-contained classroom in a regular elementary school.

III.

DISCUSSION

A.

The first issue before the hearing officer concerns whether he has jurisdiction to determine the current educational placement of [redacted]. The petitioner contends that the hearing officer lacks authority to decide that issue because it has already been decided by the federal complaints officer of the Colorado Department of Education in her decision of May 24, 1988 on the complaint filed by respondents under 34 C.F.R. §76.780 et seq. and State Board of Education Policy No. 1280.0. The petitioner claims that the decision of the federal complaints officer cannot have res judicata effect, since it is not the product of an independent third party hearing officer, and therefore, the School District has not been afforded full due process prior to the federal complaints officer's decision.

The hearing officer finds that he does have jurisdiction and authority to decide the issue of what [redacted] current educational placement pursuant to 26 U.S.C. §1415(e)(3). The proceedings initiated by respondents pursuant to 34 C.F.R. §76.780 et seq. and State Board of Education Policy No. 1280.0 are currently at a very incomplete stage. Department of Education Policy No. 1280.0 provides for an appeal of the decision of the complaints officer to the United States Secretary of Education. Petitioner has pursued such an appeal and that has not been ruled upon. If petitioner eventually loses the appeal to the United States Secretary of Education, it could still obtain a due process hearing pursuant to State Department of Education Policy No. 1280.0 by failing to comply with the Secretary of Education's decision and incurring enforcement by the State Board of Education. The petitioner then has the opportunity for a de novo hearing before an impartial hearing officer on the enforcement action of the State Board of Education. We are thus, at too early a stage in the proceedings filed with the federal complaints officer for those proceedings to have preclusive effect.

Further, if the United States Secretary of Education were to rule in favor of petitioner on the current pending appeal, the respondent would not be precluded from a due process hearing on the issue of his current placement. 20 U.S.C. §1415(b)(1)(E) strongly mandates that parents of handicapped children have an opportunity for a due process hearing with regard to "any matter relating to the. . . educational placement of the child." Since the parents are guaranteed the opportunity for a full due process hearing with an impartial hearing officer on the current placement issue, it would be grossly unfair to deny petitioner the same due process rights. As the U.S. Supreme Court recently noted in Honig v. Doe, _______ U.S. ________, 1987-88 ELHR Dec. 559.231. while many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process contained in 20 U.S.C. §1415. 1987-88 EHLR Decs. 559.231 at 559.241. Thus, petitioner's attempt to seek a hearing on the current educational placement of [redacted] is on the same footing as if the respondents were seeking a hearing on the same issue.

For the above reasons, this hearing officer shall decide the issue of [redacted] current educational placement.

B.

The next issue before the hearing officer is, during the pendency of the present proceedings, what is the current placement for [redacted]. The instant proceedings were begun on June 15, 1988 with the submission of petitioner's request for hearing, so the question can be restated, what was [redacted] current placement on June 15, 1988? His placement at that date will dictate his placement throughout the course of any future appeals in this case, since 20 U.S.C. §1415(e)(3) requires that,

> During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . .

(Emphasis added).

This provision is commonly referred to as the "stay put provision" of the EHA.

However, the current educational placement of [redacted] [redacted] on June 15, 1988 is determined by events which occurred prior to that date. Petitioners contend that on that date [redacted] current placement was homebound instruction, because on December 7, 1987, the petitioner and [redacted] agreed to an interim placement of homebound instruction until the issue of his permanent placement was finally resolved. Petitioners point out that such an agreement is specifically authorized by 20 U.S.C. §1415(e)(3).

[redacted], on the other hand, contends that she did not agree to an interim placement but only accepted homebound instruction as an alternative to the educational services offered at the December 7 staffing when it became clear that petitioners were not going to comply with the stay put provision at that time. [redacted] contends, therefore, that [redacted] placement is that specified in the November 24, 1987 staffing report, the special education resource room at Woodland Park Elementary School.

The parties did not put any interim agreement in writing and 20 U.S.C. §1415(e)(3) does not require such a writing. However, 20 U.S.C. §1415(e)(3)'s authorization for interim agreement applies only "during the pendency of any proceedings conducted pursuant to this section." (Emphasis added). Since no proceedings under U.S.C. §1415 were pending

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prior to June 15, 1988, any interim agreement entered into by [redacted] on December 7, 1987 never took effect and is a nullity.

Of course, [redacted] attempted to initiate proceedings under 20 U.S.C. §1415 by submitting a request for hearing on December 10, 1987 (Ex. F). However, John Sansone testified that for one reason or other, no such proceedings were ever initiated or conducted. Exhibit F just died on the vine, and by the time [redacted] started receiving home tutoring, the forty-five day period for receipt of the impartial hearing officer's findings and decision had elapsed. Thus, it is clear that no proceedings under 20 U.S.C. §1415 were pending between December 10, 1987 and June 15, 1988, and, therefore, no interim agreement authorized by 20 U.S.C. §1415(e)(3) could have been effective at any time during that period.

In other words, an interim agreement under §1415(e)(3) is contingent upon the School District's prompt pursuit of the due process proceedings during which the agreement is in effect. If the District fails to process the request for hearing as it did in this case, any interim agreement is void. Otherwise the District could convert an interim agreement into a permanent one by failing to process the request for hearing, benefiting from its own violation of the law.

The statute's requirement that interim agreements be effective only during the pendency of due process proceedings conducted pursuant to §1415 was consistent with the state of mind of the parties on December 7, 1987, when the purported interim agreement was consummated. The only "proceedings" under §1415 contemplated or foreseeable at that time were those about to be triggered by [redacted] on December 10 when she submitted her request for hearing. Charmaine Thaner provided [redacted] with a form to request a hearing on December 7, and, since [redacted] expressed her strong disagreement with the recommended placement at that time, all parties understood that [redacted] could request a hearing forthwith. At that time the parties could not have foreseen the §1415 proceeding initiated by petitioner on June 15, 1988. It would be grossly unfair to extend an interim agreement to separate proceedings not within the foreseeability of the parties at the time of the agreement. [redacted] certainly never agreed to an interim placement on December 7, 1987 applicable during due process proceedings commenced on June 15, 1988.

Furthermore, the hearing officer agrees with [redacted] that she reasonably concluded at the December 7 staffing that the School District had no intention of complying with the stay put provision at that time. John Sansone candidly testified that "things were happening that made it difficult for [redacted] to stay at Woodland Park." Difficult or not, the law requires the School

District to implement the stay put provision if [redacted] wanted him returned to Woodland Park School. [redacted] clearly stated at the December 7 staffing that that is what she wanted. Therefore, the hearing officer finds that no interim agreement under 20 U.S.C. §1415(e)(3) was reached on December 7, 1987. [redacted] merely agreed to accept homebound instruction as an alternative to the two other placements offered at that time. The hearing officer further concludes that [redacted] did not impliedly agree or ratify homebound instruction as a placement by accepting tutoring services for [redacted] in the face of the District's unwillingness to apply the stay put provision beginning on December 7, 1987.

The petitioner further contends that in the absence of an agreement under 20 U.S.C. §1415(e)(3), the School District legally unilaterally placed [redacted] in homebound instruction without parental consent pursuant to 34 C.F.R. §300.504 and §300.505. However, those regulations govern the conditions surrounding the initial placement of a handicapped child when a parent refuses consent for his evaluation or placement. Since [redacted] had already been placed, those regulations do not apply here. Furthermore, the stay put provision in 34 C.F.R. §300.513 applies even to due process proceedings conducted pursuant to initial placement. See 34 C.F.R. §300.504(c)(2)(i).

For the above reasons the hearing officer concludes that the current placement for [redacted] is the special education classroom at Gateway Elementary as a self-contained student.

C.

The final issue is whether the June 7, 1988 Individualized Education Program (Ex. 10) offers [redacted] a free appropriate public education as required by 20 U.S.C. §1412 and in particular, whether the petitioner has complied with §1412(5)(B) which assures that,

> to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Exhibit 10 offers [redacted] education in a day treatment program, the NEED program, operated by the Pikes Peak Board of Cooperative Educational Services in which the petitioner School District is a participant. The NEED program is a segregated facility, with no non-handicapped students. The strong consensus among those who testified was that [redacted] needed a highly structured therapeutic academic environment, with crisis intervention capabilities and a very low ratio of students to staff. He also needs psychological therapy weekly. Petitioner contends that the NEED program fulfills all of these criteria and therefore satisfies the district's requirement to provide an appropriate placement which confers some educational benefit upon the handicapped child. Board of Education of Hendrick Hudson Central S.D. v. Rowley, 458 US 176 at 200, 102 S. Ct. 3034 at 3048 (1982).

However, the Rowley test is not to be applied alone when the mainstreaming provision in §1412(5)(B) has not been met. As the Supreme Court in Rowley recognized,

> The Act requires participating states to educate handicapped children with non-handicapped children whenever possible.

Rowley, supra, 458 US at 202, 102 S. Ct. at 3049. Thus, since the petitioner has determined that a segregated facility is superior, this hearing officer must determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. Roncker v. Walker, 700 F.2d 1058 at 1065 (6th Cir. 1983); C.f. A.W. v. Northwest R-1 School Dist., 813 F.2d 158 (8th Cir. 1987).

The testimony from numerous witnesses overwhelmingly supports the conclusion that [redacted] can benefit from exposure to non-handicapped children for all of the reasons motivating congress' passage of §1412(5)(B). The petitioner does not seriously contend that [redacted] cannot benefit from mainstreaming. Principal Danin stated that he would work with [redacted] to provide a limited amount of mainstreaming even if he attended NEED. The District implicitly recognized that [redacted] can be educated in a self-contained classroom in an integrated setting by attempting to find such a placement for him in a neighboring school district. (Ex. 11).

The District presented no evidence that the cost of educating [redacted] in a self-contained special education classroom in a regular public school would be prohibitive, rendering that solution infeasible. The only witness to testify regarding cost was Katherine Bergin. When asked whether funds were available to educate [redacted] at Woodland Park Elementary, she testified that funds were not crucial, but that it did not make sense to duplicate the pre-existing program at NEED in Woodland Park. The District presented no evidence that the additional expense required to educate [redacted] properly in an integrated setting would detract from money available to educate other handicapped children. Roncker, supra at 1063.

The District never, in fact, argued that it is infeasible to educate [redacted] in an integrated setting. Rather, petitioners simply contend in their brief that they are not required to create a program to offer services in a less restrictive environment, when those services are already offered at NEED. (Petitioner's Brief at 9). However, that position does not comport with the "strong preference for mainstreaming" expressed in 20 U.S.C. §1412(5)(B) when the School District does not dispute the feasibility of providing the necessary educational services in a non-segregated setting. Roncker, supra, at 1063.

Since petitioners do not assert that costs render Dean's partial mainstreaming prohibitive this hearing officer need not reach the issue of whether the District has "failed to use its funds to provide a proper continuum of alternative placements for handicapped children." Roncker, supra at 1063.

The hearing officer concludes that the June 7, 1988 IEP (Ex. 10) does not offer [redacted] a free appropriate public education because it does not comply with 20 U.S.C. §1412(5)(B) and 34 C.F.R. §300.550 in that it does not insure to the maximum extent appropriate that [redacted] is educated with children who are not handicapped.

[redacted] needs a highly structured, therapeutic environment with a low student to staff ratio and crisis intervention capabilities. These attributes of his education can be provided to [redacted] in a self-contained environment in a regular elementary school whether that be at Gateway or at another school a reasonable distance from his home.

IV.

CONCLUSIONS OF LAW

1. The hearing officer has jurisdiction to determine all

issues presented in this case including but not limited to the issue of [redacted] current placement. Said jurisdiction is conferred by 20 U.S.C. §1415, 34 C.F.R. §300 et seq. and Part VII of the current Colorado Department of Education State Plan.

2. The current educational placement for [redacted] pursuant to 20 U.S.C. §1415(e)(3), 34 C.F.R. §300.513, and Part VII.B.6. of the State Plan is as a self-contained student in the special education classroom at Gateway Elementary School.

3. The June 7, 1988 individualized educational program does not offer [redacted] a free appropriate education because it does not comply with 20 U.S.C. §1412(5)(B), 34 C.F.R. §300.550, and Part X of the current Colorado State Plan.

V.

DECISION

1. During the pendency of the instant proceedings, the current educational placement of [redacted] is the special education room at Gateway Elementary School. [redacted] shall remain in said placement during the pendency of these proceedings.

2. The June 7, 1988 individualized educational program does not offer [redacted] a free appropriate public education because it does not comply with 20 U.S.C. §1412(5)(B) and 34

C.F.R. §300.550 as well as Part X of the current Colorado State Plan. [redacted] needs a highly structured, therapeutic educational environment with a low student to staff ratio and crisis intervention capabilities. Those attributes of his education must be provided to [redacted] in a self-contained environment in a regular elementary school whether that be at Gateway Elementary School or at another school as close as possible to [redacted] home. In this setting, [redacted] shall participate to the maximum extent appropriate in non-academic and extra-curricular activities with non-handicapped students.

Dated in Denver, Colorado this 29th day of August, 1988.

Joseph M. Goldhammer

Joseph M. Goldhammer, #5761
Hearing Officer
1563 Gaylord St.
Denver, CO 80206
(303) 333-7751

Case Number: L88:101

Status: Impartial Hearing Officer Decision

Key Topics:
Unilateral Private Placement
Free Appropriate Public Education (FAPE)
Burden of Proof
Reimbursement
Notice of Procedural Safeguards
Individualized Education Plan (IEP)

Issues:

- Whether or not the child was offered a FAPE by the district.
- Whether or not the parents were entitled to reimbursement for the unilateral placement.
- Sufficiency of notice of procedural safeguards.
- Whether IEP was developed in accordance with the law and substantively provided the child with a FAPE.
- Whether private placement provided an appropriate education.

Decision:

- District has burden of proof to show they offered FAPE.
- Parents had burden to show the IEP did not provide FAPE which was provided by private placement.
- District did not adequately notify parent of rights.
- Development of IEP was procedurally defective.
- IEP did not substantively provide student with a FAPE.
- Private placement not appropriate as it was not approved by the state therefore reimbursement was denied.

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Cont'd

Discussion:

- Intensity of services lessened although IEP goals the same.
- Performance levels drop.
- Impact of Rowley and Town of Burlington cases.
- Various required components in development of an IEP not followed.
- Poor documentation of goals, objectives and services.

BEFORE AN IMPARTIAL HEARING OFFICER
STATE OF COLORADO

FINDINGS AND RECOMMENDATIONS OF HEARING OFFICER

In the Matter of the Educational Placement of a Student,

[redacted]

Concerning

BOULDER VALLEY SCHOOL DISTRICT NO. RE-2

and

[redacted],

Parents.

Case #: L88:101

JURISDICTIONAL MATTERS

This matter comes before this Hearing Officer pursuant to a written request for hearing, dated December 8, 1988, by the parents of the Student. This Hearing Officer acts in accord with the Education for All Handicapped Children Act of 1975 (20 U.S.C. Sec. 1400 et seq., referred to as "EAHCA"), the Federal Regulations promulgated under that Act (34 C.F.R. Part 300, referred to as "Federal Rules"), the Exceptional Children's Educational Act (C.R.S. 1973, Sec. 22-20-101 et seq., referred to as "ECEA"), the State of Colorado regulations promulgated under that Act (1 CCR 301-8 Rules 2220-R-1.0 et seq., referred to as " State Rules"), and the Fiscal Year 1989-91 State Plan Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142 (referred to as "State Plan"). Specifically, this Hearing Officer was selected by the Parties in accord with the process provided by the State Plan, Part II, Sec. VII, B. 3. and notified of such on

February 21, 1989. The Parties were notified of Pre-Hearing Procedures on February 27, 1989, and a Pre-Hearing Conference was held March 15, 1989. At that time, among other issues decided, hearing was scheduled to commence April 19, 1989.

By stipulation of the Parties the requirements of the 45 and 90 day rules, as expressed in the State Plan (Part II, Sec. VII, B. 2. a. and f.) were waived. Specifically, since the issues in this matter relate purely to the provision of special education services and reimbursement for alternative placement during the school years 1985-1986 and 1986-1987, it was not felt that extending these proceedings outside the time parameters of those rules would prejudice any party nor defeat the spirit of the procedural safeguards of the EAHCA.

SUMMARY OF CLAIMS

This matter arises out of the claims of the Parents, [redacted] that their son, [redacted] (D.O.B. 5-17-71, referred to as "the Student") was deprived of a free appropriate public education, as defined and guaranteed under the EAHCA, from his second grade year through his eighth grade year in the Boulder Valley School District (referred to as "the District"). Hence, the Parents unilaterally withdrew the Student from the District and placed him at Kildonan, a private school outside of the State of Colorado for his ninth and tenth grade years. The Parents filed a civil action in U.S. District Court for the District of Colorado (Action No. 87-C-956) seeking reimbursement of their tuition and costs incurred at Kildonan those two years. Upon Motion for Summary Judgment filed by the District, in that

Federal Court case, that Court determined that before further proceedings could take place, the Parents would have to exhaust their administrative remedies under the EAHCA. Thus, this proceeding commenced.

The District contends that the Student was afforded a free appropriate public education in its schools, during each and every year of the Student's attendance, and an appropriate program was likewise planned for the school year 1985-86. Further, the District contends: that an appropriate program could have been provided for 1986-87; the Parents failed to initiate due process procedures prior to the unilateral withdrawal and alternative placement; that the private placement at Kildonan was inappropriate; and that the parents' claims are barred by the doctrines of laches and failure to mitigate damages.

PROCEDURAL/EVIDENTIARY MATTERS

The Hearing commenced April 19, 1989 at 9:00 a.m., at the District administrative building, and concluded April 24, 1989 at 10:10 a.m. The District was represented by Gerald A. Caplan and Susan S. Schermerhorn of the Law Firm of Caplan and Earnest, and were assisted by the Director of Special Education, Kathleen Krenzel. The Parents were represented by John G. Neville, Attorney at Law, who was assisted by both Parents and the Student.

The District called the following witnesses for its case in chief: Kathleen Krenzel, Director of Special Education for the District; Penny A. Neu-Carlisle, Special Education Teacher; Richard E. Gonzales, Assistant Principal at Platt Jr. High of the District; Gwendolyn Davis Kontnik, Special Education Coordinator for the District; and Dr. Lydia Swize, Director of Special Education for the District during 1985 (each may be referred to by their last name). Also for its case in chief the District offered sixteen exhibits which were admitted into evidence.

The Parents called the following witnesses for their case in chief; Heidi McClain, School Psychologist and Special Education consultant, who was admitted as an expert in evaluating learning disabilities and formulating Individual Education Programs for elementary and secondary students; [redacted], the Student; and [redacted], mother of the Student. For their case in chief the Parents offered twenty-seven exhibits, twenty-six of which were admitted into evidence. Upon cross-examination of the Parents' witnesses, the District offered another eleven exhibits, ten of which were admitted.

In rebuttal of the Parents' case, the District called the following witnesses: Don Marinelli, school psychologist; Kay Cessna, Senior Consultant, Special Education Services Unit, Colorado Department of Education; Dr. Yvonne Siu-Runyan, Reading Specialist; and Kathleen Krenzel. An additional thirty-one exhibits were offered by the District and admitted into evidence.

Burdens of Proof. By Pre-Hearing Order, the following burdens were imposed upon the Parties: the District was to bear the burden of proving that a free appropriate public education was provided by its Spring 1985 IEP, and at other times relevant to the factual issues; the Parents were to bear the burden of proving that the Spring 1985 IEP did not provide a free appropriate public education; and the Parents were to bear the burden of proving that the alternative placement at Kildonan was an appropriate educational placement.

Significant Evidentiary Ruling. In the course of the hearing, one ruling regarding admissibility of evidence was significant, as judged from the intensity of arguments of counsel. Parents' Exhibit "X" was offered as a written report authored by Dr. Rosa Hagin, Psychologist, who evaluated the Student in the Summer of 1985. It was Dr. Hagin's evaluation and recommendations which urged the Parents to remove the Student from the District and enroll him at Kildonan. According to the Parents' Pre-Hearing Statement, Dr. Hagin's report dealt extensively with the District's mishandling of the Student's educational program.

Anticipating that Dr. Hagin would not be available for the hearing, use of her testimony or her report was discussed at the Pre-Hearing Conference. The District requested certain discovery be provided regarding Dr. Hagin's evaluation as a pre-condition to either her testimony or use of her report. Counsel for both parties stipulated to the following Pre-Hearing Order:

> Use of Dr. Rosa Hagin or her July 11, 1985 psychological report shall be pre-conditioned upon counsel for the Parent providing to the District certain information requested in that letter dated February 21, 1989, from Caplan & Earnest to Mr. Neville, not later than 5:00 p.m., April 5, 1989. Oral testimony by Dr. Hagin may be taken by telephone, or her report may be accepted without her testimony and support. (paragraph 10.c., Pre-Hearing Order dated March 20, 1989)

In the course of testimony by Ms. McClain, the Parents offered Exhibit "X" into evidence. The District objected claiming information, as required by the Pre-Hearing Order, had not been provided, and that it would be prejudiced by such a hearsay document without an opportunity to confront the witness or examine the basis of her evaluation. The Parents contended that despite the Pre-Hearing Order, the Exhibit should be admitted as it formed the basis for [redacted] state of mind in the Summer of 1985 when she decided to withdraw the Student from the District and enroll him at Kildonan. Further, counsel for the Parents offered case law precedent which was persuasively in favor of admission of such documentation, i.e. In re Kristopher H., 1985-86 EHLR DEC. 507:183, and In the Matter of the Appeal of Mr. and Mrs.[ ] parents of [ ] from the decision of the Milton School District, Milton, Wisconsin ..., EHLR 501:213.

The Hearing Officer found himself with an unfortunate dichotomy between an otherwise admissible document and a Pre-Hearing Order. The following ruling was made:

> Exhibit "X" would not be admitted in accord with the Pre-Hearing Order. However, as Ms. McClain had used the data gathered by Dr. Hagin as a basis for her own opinions, she would be allowed to make reference to specific data, but not the opinions of Dr. Hagin.

Later in the hearing, during the testimony of [redacted], over the objection of the District, she was also allowed to make references to Dr. Hagin's observations. Objections to these rulings by both the District and the Parents were noted.

FACTS

It was observed by teachers and [redacted], as early as Kindergarten, that [redacted] was a slow learner. In response to suggestions by his Kindergarten teacher that he be retained an extra year, [redacted] declined. She felt such action wouldn't have an appropriate affect, would affect [redacted] sensitivity to being slow and the labeling effects would be detrimental. (Kindergarten was attended in another State)

When [redacted] was in the first grade at Whittier Elementary of the District, his teacher suggested evaluation for Special Education. He was evaluated and, with the participation of [redacted] who was without sophistication in these matters, was placed in a Special Education Program. At this stage of his schooling, the first grade, ninth month (referred to as "1.9 grade level"): [redacted] tested in the average range IQ; at grade level for math achievement; two months delayed in overall reading skills; with some behavior problems, i.e. hitting, slow to respond to questions, sensitive and emotional, lacking self-confidence. An Individual Education Program (referred to as "IEP") was developed, identifying [redacted] handicapping conditions as: Significant Identifiable Emotional or Behavioral Disorder (referred to as "SIEBD") and Perceptual or Communicative Disorder (referred to as "PCD"), but the PCD condition was noted as being "marginal". The essence of special services to the Student, at this stage, was approximately thirty minutes per day in a resource room for specialized instruction, to begin in the Fall of his second grade year. (See Exhibit "F")

At the end of grade two, 2.9 grade level, [redacted] total reading achievement was nine months behind grade level (2.0) and one test of his math achievement (not a complete testing, per Ms. McClain) showed him six months behind (2.3). His IEP showed his handicapping condition as PCD, and the one objective devoted to behavior was deemed satisfied and dropped for the next school year. (see Exhibit "G")

At the end of grade three, 3.9 grade level, [redacted] reading achievement was one year and four months behind (2.5), but there is no report regarding his math achievement level (according to Ms. McClain). Exhibit "H" does reflect some "Key Math" scores ranging from 2.7 to 3.9, and a specific objective was written addressing the time-telling skills only. The handicapping condition identified on the IEP seems to be PCD, with all objectives addressing that disorder. According to Ms. McClain, the failure of the District to address and deal with behavior problems at this stage of development was critical. She explained that if a student had not learned acceptable behavior by the third grade, it became very difficult thereon.

Spring of 1981, at [redacted] 4.9 grade level, there was a reevaluation of [redacted] adaptive behavior (Exhibit "J"), academic achievements (Exhibit "K"), and speech and language (Exhibit "K"). Evaluations recognized [redacted] great difficulty mastering academic tasks and the possibility that emotional/behavioral concerns may develop from continual failures. Also noted, at this time, are emotional stresses arising out of father's health and [redacted] having been a victim of sexual abuse. Academically, [redacted] scored 2.6 overall for Reading (compared to 2.5 for previous year), 1.6 for Spelling, and 1.5 for Math (compared to scores on the Key Math test ranging from 2.7 to 3.9, in previous year).

Although [redacted] scored consistently below average in all areas of language, "further speech/language intervention [was] not recommended at [that] time" (Exhibit "K"). Although there were noted some concerns regarding [redacted] emotional and behavioral stresses, the IEP provided for no goals/objectives to address those concerns. The IEP called for a self-contained classroom, presumedly for the bulk of the academic subjects. (Exhibit "N") Also recommended was an occupational therapy evaluation for Fall 1981. That evaluation found his perceptual-motor performance within normal limits, but recommended evaluating visual activity and taking steps to increase his fine motor activities.

At the end of [redacted] fifth grade year, at grade level 5.9, [redacted] test scores reveal Reading performance at 3.3 (compared to 2.6 reported in previous year), Math at 4.0 (CTBS) or 3.9 (WRAT) (compared to 1.5 for previous year), and Spelling at 3.5 (although this is inconsistent with the notations on Exhibit 30, page 2 - which reports performance at 2.3 grade level). Recommendations appear to be consistent for continued self-contained classroom instruction, with a goal of mainstreaming math (why? when performance is almost two years behind?). Yet Exhibit 38 reads: "The extent to which this child will be able to participate in regular educational programs averages 26 hours out of 30 hours per week." In the fall of 1982, additional goals are added to the IEP to address some specific behavioral problems (Exhibits 44 & 45).

Spring 1983, at the end of grade level six year, the staffing report indicates math performance at 3.1 (compare to 4.0 in previous year). Reading performance appears to be reported at 3rd grade level (compare to 3.3 in previous year), no report re: spelling (seems to have been dropped as an area of concern - see

Exhibit 42 - although performance was 2.3 in 6th grade), and written language skills seem to have some potential (see Exhibit 48). It was also noted that [redacted] behavioral problems have decreased, but concern continued regarding interaction with supervisory personnel. Goals were written addressing math, reading, and writing skills, and the behavioral problem noted above. (Exhibits 51 & 52). In the Fall of 1983, the IEP was modified to decrease time spent in the self-contained classroom from 15-20 hours to 10 hours per week. (Exhibit 54)

At the end of the seventh grade level year, Spring 1984, a triennial assessment was conducted. Cognitive ability scores were: Perceptual Speed Cluster, 4.5; and Memory Cluster, 2.3. Academic achievement, per Woodcock-Johnson, was: Reading, 4.1; Math, 5.8; Written Language, 4.1; and Knowledge, 6.4. Academic achievement, per WRAT, was: Reading, 3.9; Spelling, 3.3; and Math, 3.6. (Exhibit 61) At this point, it becomes very difficult to compare testing scores to determine to what extent [redacted] is progressing, or benefiting, from his educational programs.

Of significance are the psychological and adaptive behavior reports (Exhibits R and 60).

> "Although [redacted] is able to behave appropriately in a one to one situation, his behavior in group situations, especially when confronted with tasks involving reading or writing is often inappropriate. [redacted] may be so sensitive about his inability to function academically that he defends himself by attempting to distract others is these situations. These attempts stem from the frustration he feels at school". (Exhibit R)

> "Generally, school was a more successful experience for [redacted] last year than this. Although last year was not without it's difficulties . Last year's teacher, Diana Mareness, describes [redacted] class behavior with her as generally appropriate. His academics were

> described as significantly hampered by a second grade reading level. On the playground [redacted] behavior could often be "outrageous" with punching of others which ended at one point in his being "benched" for 2 weeks. [redacted] was also extremely disruptive when there was a substitute teacher. [redacted] was "mainstreamed" into a regular 6th grade class for science and social studies. He participated appropriately and did his classwork. Generally, Diana Mareness felt [redacted] responded best to a very "firm hand" with clear external structure and predictable consequences, both positive and negative, for his behavior.
>
> This year in school with placement in 7th grade there has been some significant regression in [redacted] ability to perform academics and in his ability to contain impulses and interact socially appropriately.
>
> * * *
>
> [redacted] appears to be in sufficient distress that he is only minimally benefitting from his special education placement. He certainly appears to be significantly PCD with the addition of EBD characteristics which compound the problem. It is significant that [redacted] was able with firm and clear external structure, some anticipatory counseling and support, tolerate well 2 mainstreamed classes last year. It should be kept in mind that [redacted] apparently responds best to positive expectation setting. It is possible that a good deal of his deviant behavior may be due to frustration and feelings of inadequacy at school. However, it is also possible that [redacted] may be expressing symptoms of distress from reasons other than fear of academic failure. (Exhibit 60)

These observations are especially noted because the IEP goals did not change from the previous year, yet the intensity of service lessened (from self-contained 15-20 hours/week to resource room 10-15 hours/week - see Exhibits 64 and 51). It seems inconsistent that behavior and academic performance worsen through the seventh grade, yet the District's response is to withdraw services. and continue on towards their goal of mainstreaming. Mainstreaming for any academic class, when academic performance is 2-3 years behind, is clearly not understandable.

In the Spring of 1985, an annual review is scheduled and held at Platt Jr. High. Since this is the educational program which is being reviewed (although the Parents sought review of all 8 years of educational programs), its process and resultant content will be reviewed in detail. First, a comparison of 1985-86 "Needs" to the previous year's (Exhibits U & V):

NEEDS

1984-85	1985-86
I. Educational/Curricular:	
To improve reading comprehension	To improve all basic skills: reading, math, and written lang.
To improve written language skills (spelling, etc.)	
To improve math skills	
To improve study and organizational skills.	
Improve attendance	Increase on task behavior.
Decrease tardiness.	
II. Social/Emotional:	
To continue to take responsibility for academics and behaviors.	Improve self concept
To learn to verbalize feelings	Decrease acting out behavior
To continue to improve self-concept.	Increase impulse control.
To develop self-acceptance.	Take responsibilty for his actions.
To improve peer relationships.	Improve relationship with authority figures.
To improve relationship with authority figures.	
III. Information Processing:	
To improve memory skills	Improve and short term memory.
To improve perceptual speed skills	
Please see IV (Communication)	
IV. Communication:	
To improve auditory memory skills	(no needs noted)
To improve auditory processing of information.	
To improve direction following (oral) skills.	

VII. Prevocational/Vocational/Avocational:

To develop an awareness of the world of work. To develop awareness of various career opportunities.	Participate in vocational aptitude assessment.

VIII. Home - School Interaction:

Parent would like to maintain consistent communication with school personnel.	Continue home/school report

Next, a comparison of Characteristics of Services to Meet Educational Needs, 1984-85 and 1985-86 (Exhibits U & V):

1984-85	1985-86
I. Educational/Curricular:	
Provide small group instruction, individualized instruction, materials at his functioning level use of multi-sensory approach, visualizations, imagery; provide close supervision, monitoring, set limits; allow [redacted] to set his own goals, provide concrete information to [redacted] about his learning style, discuss strength and weaknesses; provide support, positive affirmations, success oriented experiences; provide learning materials related to his interests. Behavior modification Daily progress reports - consequences related to out-of-school activities as well as in school.	Small group instruction Much structure Use visual clues to augment and processing difficulties Use behavior modification as appropriate for a junior high student.
II. Social/Emotional:	
Provide much support, explicit limits and consequences; [redacted] responds well to positive adult expectations and limits. Use of affective materials, opportunity to verbalize with a supportive adult, use of role playing, help [redacted] to become involved in extra curricular activities; create positive ways for [redacted] to exert con-	Much support. Small group discussion with social worker. Visualize how to handle a situation Practice responses to a situation

trol over his environment, give choices to [redacted], allow [redacted] to have input. It will be necessary to have regular conferences and communication with regular ed teachers to inform them of [redacted] learning problems. Begin to teach compensatory skills, possible use of computer. Anticipatory guidance & goals to deal with stressful events & behaviors. Use of student journal.

III. Information Processing:

(no characteristics of service noted)	Teach compensatory skills.

IV. Communication:

Teach compensatory skills, color coding, outlining, mnemonic devices, cueing, tie visual cues in with oral directions.	(no characteristics of service noted)

VII. Prevocational/Vocational/Avocational:

Provide interest inventory. Cocis inventory.	Use COCIS Research report on various careers.

VIII. Home - School Interaction.

Periodic telephone calls; provide parent with positive information about [redacted] as well as negative information. Provide Progress Reports once monthly from regular ed. teachers Provide progress reports from special ed. teacher twice monthly	bi-weekly reports or when needed.

And from needs and characteristics of service, we progress to a comparison of goals 1984-85 to 1985-86 (Exhibits U & V):

1984-85	1985-86
#1. This learner will improve reading skills from 4.1 gr. level	Increase all basic skills, reading, written language,
to 5.1 gr. level as measured by Woodcock Reading Test.	& math from mid 4th to mid 5th.

#2. This learner will improve math skills from 3.6 gr. level to 4.6 gr. level as measured by Key Math test.

#3. This learner will improve written language skills from 4th gr. level to 5th gr. level as measured by student pre-post written sample.

#4. This learner will demonstrate consistent level of academic performance at a level of expected performance based on ability and teacher log.

#5. This learner will begin to put words to a full range of appropriate affect and follow through with appropriate verbal expression, as measured by student journal and teacher log.

Course Goals:

#1. This learner will receive 5hr. of credit per semester for English and Math through the Spec. Ed. Learning Lab and will receive a passing grade as measured by school report card.

Receive credit for Math & English & Government thru resource by meeting requirements grades.

Increase appropriate behavior in school from 2-3 discipline referral forms day to 1-2 a week. Log - charting.

Participate in pre-vocational aptitude assessment.

Follow systematic exclusion contract

[redacted] testified that, at the end of the 1984-85 school year, she was sufficiently frustrated at [redacted] deteriorating behavior, lack of academic progress, and the inadequate response from the District that she sought help from her father. Through his support she arranged an evaluation by Dr. Rosa Hagin, a psychologist who specialized in learning disabilities. According to [redacted], Dr. Hagin recommended that [redacted] needed to be in an environment that was completely geared to his learning disability. [redacted] was so far behind, because of prior inadequate programing, that he needed intensive services to recover, according to Dr. Hagin. Upon receiving Dr. Hagin's report and recommendations, according to [redacted] [redacted], she contacted the then Director of Special Education, Dr. Lydia Swize. Her telephone encounter with Dr. Swize was somewhat heated, certainly from [redacted] end, and apparently to some extent from Dr. Swize's too. [redacted] [redacted] said that she asked for a change in program, based upon Dr. Hagin's report. She reported that Dr. Swize rejected Dr. Hagin's recommendations, out of hand, and that she refused further consideration of change in program. This encounter, said [redacted], was "etched in my mind".

Dr. Swize's testimony confirmed certain aspects of this encounter. It took place in the month of August 1983. There was conversation regarding Dr. Hagin's report and recommendations. And there was anger on [redacted] part. But Dr. Swize's recall of whether or not the encounter was over the telephone or in person is not as firm as [redacted]. When confronted with statements made by the District's attorney in its Pre-Hearing Statement, Dr. Swize's recall was uncertain: never really clear - probably she phoned, then we met - positive that we met - face to face - during the summer - exact day is hard to specify - but its possible that she called (paraphrased).

As to whether or not [redacted] requested a change in [redacted] [redacted] placement or program, Dr. Swize says not, but her testimony points in another direction. First, there's the following statement in the District's Pre-Hearing Statement:

> Dr. Swize will testify that at the end of the summer of 1985, [redacted] called her to inform her of the [redacted] withdrawal of [redacted] from the District. She will further testify that although she informed [redacted]. [redacted] of her right to request a staffing and a change in Christopher's educational placement, [redacted] declined to do so. (District's Pre-Hearing Statement, p.14)

Further testimony by Dr. Swize, on cross-examination, indicated that she heard clearly from [redacted] that [redacted] needed a classroom for dyslexic children, and that she was totally frustrated with the District's programs.

[redacted] greater incentive to recall the events more clearly than Dr. Swize, and her unshaken recall of the conversation, versus Dr. Swize's less certain recall of the chain of events, the time, place, etc., are persuasive. In addition, one must question what kind of response the District should be giving to an angry parent who vehemently believes that the school has made fundamental errors in programing, to the point of withdrawing. Perhaps some follow-up inquiry, or at least some correspondence offering further discussion, a staffing review, or even, to cover one's bases, written advisement of rights. But the school did nothing in response to this frustrated woman's cry for help. The request for a change of placement was communicated to the District's Director of Special Education, in August 1985.

From that point in time, these Parties truly went their separate ways. [redacted] marshalled the resources of family and placed her son in a school specially designed to rehabilitate him from eight years of what she perceived as inadequate and often misdirected efforts. The school did nothing to follow up, no notices, no inquiries, just recorded the fact that the Student did not show up for Fall term.

According to the scant documentary information offered into evidence, [redacted] benefited from the intensive schooling at Kildonan. According to Exhibits 137 & 138, Gray Oral Reading Test results improved from 3.7 grade level to 7.3 in two school years at Kildonan. Morrison McCall Spelling Test results went from 3.3 to 6.6. According to [redacted] testimony, he experienced great differences in his: ability to compose paragraphs; penmanship - consistency of handwriting improved; reading improved from 3rd grade level to 9th grade level (inconsistent with Exhibit 138). Beyond the academics, [redacted] felt better about his disabilities, his abilities, and he seemed to have genuinely enjoyed the learning experience at Kildonan. A total of $37,300 was incurred by the [redacted] for tuition and expenses, for the two years at Kildonan (Exhibits Y & Z).

After his tenth grade year at Kildonan, [redacted] had depleted her financial resources, and [redacted] returned to the District. [redacted] has been enrolled in regular education where he appears to be performing at a below average level (1.412 GPA for the Fall semester), as compared to the regular education population. The District has offered special education to this Student, but [redacted] has rejected such programing.

EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

The EAHCA is an attempt by the Federal government to promote the education of children who, because of some impediment, would otherwise have great difficulty learning in a public school setting. By this Act, Federal funding would be provided to states to assist them in educating handicapped students, conditioned upon the State demonstrating that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education" (EAHCA Sec. 1412 (1)).

"Free appropriate public education" is defined in the EAHCA as:

> ...special education and related services which
> (A) have been provided at public expense, under public supervision and direction, and without charge,
> (B) meet the standards of the State educational agency,
> (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. (EAHCA Sec. 1401 a. (18))

"Individualized education program" is defined in the EAHCA as:

> ... a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include
> (A) a statement of the present levels of educational performance of such child,
> (B) a statement of annual goals, including short-term instructional objectives,
> (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
> (D) the projected date for initiation and anticipated duration of such services, and

> (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In accord with the EAHCA and the regulations promulgated thereunder, Colorado gives effect to its purposes through its statute, ECEA, and its State Rules., and the State Plan developed by the State Department of Education. The predominant Supreme Court case which has interpreted congressional intentions in the EAHCA is Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982). Under the Rowley holding, the EAHCA requirement of a free appropriate public education is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Rejecting a contention that Congress intended that each handicapped child be provided with a program which maximizes potential, the Court held that the EAHCA was designed to identify and evaluate handicapped children, and to provide them with access to a free public education, a "basic floor of opportunity".

REIMBURSEMENT ISSUE

The Parents seek reimbursement of their expenses incurred educating [redacted] at Kildonan for his ninth and tenth grade years. That the Parents may be entitled to such reimbursement was established in School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985). Under the Act, a reviewing court was granted the authority to "grant such relief as the court determines appropriate." (EAHCA 1415(e)(2)) The Supreme Court concluded that such authority included the power to order reimbursement of expenses to parents who unilaterally place their child in private educational facilities, if such placement is appropriate, rather than the IEP proposed by the District. To determine the appropriateness of first the District's IEP, and then the Parent's private placement, each of those must be reviewed in light of the EAHCA and Rowley.

In Rowley, the Court used a two-part test for determining whether or not the District has proposed a free appropriate public education: first, did the District comply with the procedures of the EAHCA; and second, was the IEP reasonably calculated to enable the Student to receive educational benefits. These questions must be answered in this order, as the Court found:

> ... the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, ..., demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP. Rowley, at p. 206

PROCEDURAL COMPLIANCE

The District's compliance with the procedural requisites of the EAHCA is measured by a comparison of the process by which the IEP for Spring 1985 was developed against the EAHCA, Federal Rules, ECEA, State Rules, and the State Plan. Thus, this step-by-step discussion of the pertinent parts of that process:

> Review. Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year. (Federal Rules, Sec. 300.343(d) - see also, C.R.S. 1973 Sec. 22-20-108(4); State Rules, Sec. 2220-R-5.0; and State Plan, Part II, Sec. VI.5.)

There was no dispute in the testimony that the purpose of the Spring 1985 staffing was to review the Student's IEP, in accord with this provision of the law.

> (a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
> (1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and
> (2) Scheduling the meeting at a mutually agreed on time and place.
> (b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.
>
> * * *
>
> (e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting,...
> (f) The public agency shall give the parent, on request, a copy of the individualized education program. (Federal Rules, Sec. 300.45 - see also State Rules, Sec. 2220-R-5.03)

> Written prior notice regarding review staffings must be given in a timely manner so as to give the parent an opportunity to attend and participate and must include:
> a. The procedures for conducting special, annual, triennial, and termination staffings.
> b. The time, place, and purpose of the meeting.
> c. The opportunity to reschedule the meeting if the time and place set forth is not mutually convenient.
> d. The opportunity to examine records in accordance with Section VIII of this Plan. (State Plan, Part II, Sec. VI. B. 5.)

> "Timely manner" means that prior notice is received no later than ten school days prior to any action. (State Plan, Part II, Sec. VI. C. 3.)

There is no dispute that the District consistently gave [redacted] [redacted] ample opportunity to be at meetings, that she responded by actively participating, and that she received a copy of the IEP. Nor was there any real dispute regarding the sufficiency or timeliness of notice of meeting times, places or locations. The notice of the Spring 1985 meeting, according to the testimony of Kathleen Krenzel, was Exhibit 72. That document gives notice of: time, place, and purpose of the meeting; parents' opportunity to participate; and an opportunity to reschedule if time/place inconvenient. Exhibit 72 does not: give notice of the parent's opportunity to examine records; give notice of procedures for the conduct of special, annual, triennial, or termination staffings; nor does it give notice of who will attend that meeting, except as to the Special Education teacher.

Sufficiency of notice of procedural safeguards was intensely contested at the hearing. The District's witnesses, Krenzel, Neu-Carlisle, and Davis, all testified regarding the efforts to review procedural matters with [redacted] at all meetings, including the Spring 1985 meeting. [redacted] contended, consistently throughout the hearing, that the only time she was actually advised of her procedural rights was in the Spring of 1978, in connection with initial identification, evaluation and placement of her son (see Exhibit 10). This contention was not shaken by the District's repeated reminders to [redacted], in cross-examination, that she acknowledged receipt of "the procedural safeguards" or the "Parents' and Students' Rights" brochure, April 1982, October 1982, October 1983, January 1984, February 1984, May 1984, and April 1985 (Exhibits 38, 44, 54, 55, 65, 70, and 76. [redacted] consistently and ardently responded that she was always overwhelmed by the proceedings, relied heavily upon the District's staff, signed what was asked of her, and considered references in those documents to be to the advisement of rights received in 1978.

Mrs. Krenzel testified that Exhibit 77a, a packet which includes the brochure "Parents' and Students' Rights" was "typically" given to all parents at the time of the staffings. Accepting Mrs. Krenzel's statements at face value, the District has not met its burden of showing compliance with this procedure, in that: there was no evidence that anyone actually delivered a copy of the brochure "Parents' and Students' Rights" to [redacted], except in 1978; and there was no indication that such advisements of rights were provided to [redacted] in advance of the meetings, particularly the Spring 1985 meeting.

> The public agency shall insure that each meeting includes the following participants:
> (1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.
> (2) The child's teacher.
> (3) One or both of the child's parents, subject to Sec. 300.345.
> (4) The child, where appropriate.
> (5) Other individuals at the discretion of the parent or agency. (Federal Rules, Sec. 300.344 (a) - see also State Rules, 2220-R-5.01(1) and State Plan, Part II, Sec. VI. B. 5.)

Exhibit 76 reveals the following participants at the Spring ? 1985 staffing: Gwendolyn Davis, Special Education Director/Designee; Rich Gonzales, School Administrator; Clette Kettle, Counselor; Penny A. Neu-Carlisle, Special Education Teacher; and [redacted], Parent. This procedural safeguard was met by the District.

For the purpose of developing the IEP, at each meeting, the State Plan provides comprehensive policy and procedures. The following discussion will compare those policies and procedures, one at a time, with evidence of compliance at the Spring 1985 staffing and as reflected in the resulting IEP (see Exhibit U):

> POLICY
> The Department of Education shall ensure that each admin-

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> istrative unit establish and follow procedures for determining whether or not a child/youth is handicapped for recommending appropriate services and for developing the individualized educational plan (IEP).
>
> **PROCEDURES**
> Each administrative unit shall include in its local comprehensive plan the manner in which the unit intends to comply with this policy. At a minimum, however, the unit shall:
>
> * * *
>
> f. Adhere to the following functions of the staffing/IEP committee: . . .
>
> (1) Assure that a comprehensive assessment of sufficient scope and intensity has been completed.

The Spring 1985 review was the first review after a Triennial Review (Spring 1984). Thus, this staffing committee relied upon assessments documented in 1984, together with new information provided by participants. However, the Staffing Report indicated significant new problems:

> [redacted] has had a very hard last three weeks, his behavior is deteriorating rapidly. He has a difficult time realizing that he's responsible for the consequences which occur due to his behavior. He has a hard time with the reality of the situation. He has had many encounters with the administration (in the tunnels under Platt, calling teachers names, taking items from the shop teacher, losing temper, and general mischief.) He appears to be losing control, has a hard time not manipulating the adults around him, and in general doesn't seem to feel good about himself.

In addition, there was considerable testimony which indicated notice to the committee that [redacted] had been engaging in self-mutilation, runaway behaviors, depression and some unspecified delinquency behaviors. Whether or not a comprehensive assessment had been conducted to address these newer features of the Student's functioning was neither discussed nor documented in Spring 1985.

(2) Determine the present levels of functioning;

Except for lacking documentation of [redacted] more recent behavioral problems, Exhibit V "Staffing Report" addressed the five areas of functioning required by law.

(3) Determine the educational needs of the child/youth.

While there is a documented discussion of the Student's needs in Exhibit V, in this time of increasing problems for this youth, it is not apparent from the documentation why some needs expressed in the previous year's IEP have been omitted in 1985. For example: improvements in attendance; verbalization of feelings; peer relations; perceptual speed skills; and all the communication related needs expressed in 1984.

(4) Determine whether the child/youth is unable to receive reasonable benefits from regular education due to the handicapping condition described in 1.01 of the Rules.

Although not documented, it was clear from the evidence presented at the hearing that the Student continued to be unable to receive reasonable benefits from regular education due to handicapping conditions of PCD and SIEBD.

(5) Prioritize and cluster identified needs into annual measurable goals.

Testimony at the hearing by Kontnik and Neu-Carlisle suggested that identified needs were prioritized, yet the only documentation of such an effort is the assignment of goal numbers 1 through 5. It is not clear that this numeration of goals also indicates priorities. If so, it is not clear from the evidence why those priorities were assigned. Also, there is no documentation that the following needs were addressed by goals: increase on task behavior; improve self concept; take responsibility for his actions; improve relationship with authority figures; improve short term memory; and continue home/school report. Further, two of the state "goals" appear vague and not measurable: receive credit for math & English thru resource by meeting requirements grades; and follow systematic exclusion contract.

(6) Identify the characteristics of services which will meet the child's identified needs/goals.

Comparison between this IEP and the 1984 IEP is particularly revealing for compliance with this procedure. The 1984 Needs Assessment was very detailed regarding the characteristics of services to meet the Student's needs. Now, in 1985, when the Student's functioning has deteriorated significantly, it is very unclear why the services described are without that detail. The needs identified, in light of the Student's continued poor functioning and the Parent's expressed concerns, demanded articulation of service characteristics. There is no such detail in this IEP.

(7) Recommend placement in the least restrictive environment.

Exhibit 70 contains the following statement: "The Educational Program and Related Services herein are designed to meet the unique needs of the student and are the least restrictive alternative for provision of an appropriate education." There is no other documentation substantiating this statement. There is no apparent discussion, documented, regarding alternatives placements.

> (8) Develop or assure the development within 20 school days of:
>
> i. Short-term instructional objectives based on the established annual measurable goals.
> ii. Evaluation criteria.

There is no documentation, nor was there any testimony at hearing, which indicated compliance with this requirement.

> (9) Keep accurate records of all proceedings.

There was testimony at the hearing which indicated a fair amount of dissatisfaction expressed by [redacted] regarding the proposed program, yet we don't know if her concerns were regarding undocumented needs, characteristics of services, or what. There was also testimony, disputed, regarding significant concerns of recent behavior problems for the Student. In addition to other omissions, noted above, each of these items could have and should have been documented, for a complete record. What has been documented, presumably, is a scant record of the concensus only.

> (10) Identify the specific special education and related services to be provided to the child and the extent to which the child will be able to participate in regular educational programs (refer to the LRE section of this Plan).

The following notations are made in the IEP in attempted compliance with this requirement: Sp Ed Inst - Sp Ed teacher - S/C - SW. Nothing specific about it. Except to specify the number of hours allocated to special education services and regular education, there is no discussion, nor documentation, of the components of these programs from which it can be determined that they would provide the needed services.

> (11) Establish the dates for initiation of services and the anticipated duration of the services.

This requirement was complied with.

> (12) Identify the objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

In determining whether or not any student is making progress, or deriving benefit from a program, this requirement is crucial. Yet, the only objective criteria identified are: increase academic skills from mid 4th to mid 5th; " 2-3 discipline referral forms per day to 1-2 a week"; and participation in the pre-vocational assessment. The only evaluation procedure which is discernable is for disciplinary referrals, and that procedure is fixed and can be anticipated by parent or student alike. But "teacher made test - informal - student assessment" is vague, not capable of forming any reasonable expectation for the form and content for measuring success or failure. And finally, the systematic exclusion contract is left totally to the imagination, without documentary explanation.

> (13) The staffing team shall consider all possible alternative placements where the services may be provided. The staffing team shall recommend placement in the least restrictive environment which most accurately reflects the needs of the student and gives appropriate consideration to the desires of the parents/guardian.

Once again there is no documentation respecting this requirement, even though, according to testimony at trial, there had been considerable discussion of the Helsion School as a possible program for the Student.

The District was notified of substantial dissatisfaction with the Spring 1985 IEP, and [redacted] requested a change of program. In light of that, the District was required to provide to the Parents a complete notice of procedural safeguards. (Federal Rules, Section 300.504 (a)) This requirement was not met by the District.

SUBSTANTIVE COMPLIANCE

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

The Parents contention was that the history of inadequate programing and especially the history of lack of progress academically for [redacted] was strongly indicative of inappropriate IEP's. But the issue was not the appropriateness of each IEP from 1978 to 1985. The factual issue for determination was whether or not the Spring 1985 IEP provided for a free appropriate public education. To make that determination, the history of programing and progress was relevant.

It is poor reflection on the District that the Student's progress is not easily determined. Test results in the early years showed decreasing ? levels of progress in academics. But when tests were not done, or testing methods changed, it became unclear whether or not progress (or "benefit") was attained year to year.

However, whether or not the Student progressed in the years 1978 to 1985 was not relevant. The Spring 1985 IEP must answer the question, given the child's present status (as miserable as it was), does this program provide him with access to education, a "basic floor of opportunity"; for attaining reasonable educational benefit? *Rowley*, supra. In answer, given the poor documentation of goals, objectives and services, it must be concluded: we don't know! Thus, the District has failed to meet its burden.

The IEP was procedurally and substantively defective, due to absence of the requisite notices of procedural safeguards and in the lack of adequate documentation. The District's IEP was not appropriate, did not provide the Student with a free appropriate public education.

APPROPRIATENESS OF KILDONAN PLACEMENT

When parents unilaterally change their child's educational placement, they do so at their own financial risk and with the burden of proving that placement appropriate. *Burlington School Committee v. Massachusetts Department of Education, supra*. Appropriateness of that private placement is to be measured against the same statutory standard against which the District's placement was measured:

> The term "free appropriate public education" means special education and related services which
> (A) have been provided at public expense, under public supervision and direction, and without charge, *and*
> (B) meet the standards of the State educational agency,
> (EAHCA Sec. 1401 (18)) *Schimmel vs. Spillane*, 819 F.2d 477 (4th Cir. 1987)

"The statute simply does not permit school systems to place and fund handicapped children in unapproved private schools." *Schimmel* at p. 484. The Federal Rules are consistent:

> (a) If a handicapped child has available a free appropriate public education and the parents choose to place the child at a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Regs 300.450-300.460. (Sec. 300.403)

For all the evidence that indicates that the Student prospered and benefited greatly from his two years at Kildonan, it does not overcome the uncontroverted testimony that the Kildonan School was not approved by the Colorado Department of Education.

The Hearing Officer is not aware of any case law which overcomes the clear statutory limitations on placements in private facilities. Even the fact that the District has not provided sufficient due process notices does not give authority to the School, the State, nor the Courts to violate Federal Law. Tucker v. Bayshore Union Free School District, U. S. Court of Appeals, 2nd Circuit, No. 88-7804, April 18, 1989; and Antkowiak v. Ambach, 838 F2d 635 (2nd Circuit 1988) cert. denied 109 S. Ct 133 (1988) Thus, the placement at Kildonan was not appropriate, and reimbursement should be denied.

CONCLUSIONS AND RECOMMENDATIONS

The IEP developed for [redacted], in Spring 1985, was not appropriate, lacking sufficient documentation of goals, objectives, description of program, and compliance with procedural safeguards. The private placement at Kildonan for the school years 1985-86 and 1986-87 was not appropriate, having not been approved by the Colorado Department of Education.

It is therefore recommended to the Board of Education of the Boulder Valley School District No. RE-2 that the claim for reimbursement of tuition and other expenses made by the Parents be denied.

DATED this 12th day of May, 1989.

David C. Hoskins
Impartial Hearing Officer

CERTIFICATE OF MAILING

I certify that a true and correct copy of these Findings and Recommendations of Hearing Officer was deposited in a receptacle of the U.S. Postal Service, postage pre-paid and correctly addressed this 12th day of May, 1989 to:

Gerald A. Caplan
Caplan and Earnest
2595 Canyon Blvd., #400
Boulder, Colorado 80302-6703

John G. Neville
1881 9th Street, #216
Boulder, Colorado 80302

Case Number: S88:101

Status: State Level Review

Key Topics:
Free Appropriate Public Education (FAPE)
Private School
Reimbursement
Standard of Review
Burden of Proof
Attorney Fees

Issues:

- Were the parents entitled to reimbursement for expenses incurred in placing student in a private facility?
- Was the IHO wrong in finding private placement inappropriate because it was not approved by the state?
- Did the district fail to provide a FAPE?
- Did the IHO make procedural errors?
- Entitlement to attorney fees

Decisions:

- The district failed to provide the student with a FAPE.
- Private placement was inappropriate and does not meet state standards.
- Parents not entitled to reimbursement for costs of private placement but entitled to reimbursement for what would have been costs of an appropriate private placement.
- IHO erred in placing burden of proof on district.
- Poor documentation of goals, objectives and services on IEP was a procedural defect.
- Each party is to pay their own attorney fees.

Discussion:

- Child's educational history, staffings and IEP development.
- Events leading to unilateral private placement.

Case Number: S88:101
Cont'd

- Benefit child received at private facility.
- Available district programs.
- Necessity of residential placement in some cases.
- Failure of district to serve child.
- Approved process for residential facilities.
- Factors to determine costs appropriate for reimbursement.

[illegible]

BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. [redacted] S88:101

DECISION UPON STATE LEVEL REVIEW

[redacted], by his parents, [redacted] and [redacted].
[redacted]

Appellants.

v.

BOULDER VALLEY SCHOOL DISTRICT NO. RE-2

Respondent.

This matter was submitted to Don P. Stimmel, Administrative Law Judge, State Department of Administration, for review of the decision of David C. Hoskins, Impartial Hearing Officer, under appropriate rules and statutes. A request for an evidentiary hearing was denied following submission of briefs on that subject. Briefing following issuance of that order was concluded on August 25, 1989. Petitioners were represented by John G. Neville, Attorney at Law, Boulder, Colorado; the Respondent School District was represented by Gerald A. Caplan and Susan Schermerhorn of Caplan and Earnest, Attorneys at Law, Boulder, Colorado.

In the text of this decision, the Administrative Law Judge uses the following abbreviations or other designations:

DESIGNATIONS	MEANING
A.L.J	Administrative Law Judge
I.H.O.	The Impartial Hearing Officer (Mr. Hoskins)
The District	Boulder Valley School District No. RE-2
Whittier	Whittier Elementary School, Boulder, Colorado
Foothill	Foothill Elementary School, Boulder, Colorado
Centennial	Centennial Jr. High School, Boulder, Colorado
Platt	Platt Jr. High School, Boulder, Colorado
Boulder High	Boulder High School, Boulder, Colorado
Halcyon	Halcyon School, Boulder, Colorado
The Child	[redacted]
The Mother	[redacted]
Petitioners	The Child and his parents, collectively
The Department or CDE	Colorado Department of Education

SEA	State Educational Agency
LEA	Local Educational Agency
F.A.P.E.	Free Appropriate Public Education
I.E.P.	Individual Education Program
RCCF	Residential Child Care Facility
SIEBD	Significant Identifiable Emotional or Behavioral Disorder (Handicapping Condition)
P/C	Perceptual or Communicative Disorder (Handicapping Condition)
I.Q. -	Intelligence Quotient
Kildonan	The Kildonan School, Amenia, New York
EAHCA or the "Act"	Federal Education for All Handicapped Children Act, 20 USC §1401 et seq.
Federal Regulations	Regulations relating to an implementing the EAHCA, 24 CFR Park 300
C.R.S.	Colorado Revised Statues, as amended from time to time
ECEA or the State Act	Colorado Exceptional Children's Educational Act, C.R.S. Tit. 22 Art. 20
State Regulations	Rules implementing the State Act 1 CCR 301-8
State Plan	Colorado State Plan for implementing the EAHCA (effective period noted when appropriate)
A.P.A.	Colorado Administrative Procedure Act, C.R.S. Tit. 24, Art. 4

PROCEDURAL HISTORY

An evidentiary hearing was held before the I.H.O. on April 19, 20, 21, and 24, 1989, at the District Administration Building in Boulder, Colorado. The I.H.O. issued his decision on May 17, 1989. The decision included some conclusions unfavorable to the District, but denied the Petitioners' claims for relief. Petitioners appealed to the Department by letter of June 7, 1989. The District, by letter of June 16, 1989, announced a reservation of the right to present additional issues for review. The Department referred the matter to the Division of Administrative Hearings on June 23, 1989.

After receiving the appeal letters, the A.L.J. contacted counsel and conducted an informal prehearing conference in Boulder on July 12, 1989. At that conference, the A.L.J. set out briefing schedules, initially for preliminary briefs on the issue of whether or not an evidentiary hearing would be appropriate, with subsequent briefing depending on the ruling on that issue. On July 27, 1989, the A.L.J. determined that evidentiary hearing would not be necessary and so informed counsel by telephone. The A.L.J. issued a written ruling denying the request for evidentiary hearing on August 16, 1989. In that ruling, he asked counsel to keep open the date previously set aside for the evidentiary hearing in the event he decided from the briefs that such a hearing was necessary. After receiving and reviewing the briefs, the A.L.J. informed counsel by telephone that no additional hearing would be necessary.

The parties stipulated at the outset that the Child was not presently involved in any special education program, and the issues related solely to potential reimbursement for prior placement. Consequently, no need for rapid determination exists in this case and counsel for both parties waived the time limits set forth in the Act, Federal Regulations and related State statutes and rules.

STANDARD OF REVIEW

This review is part of a proceeding brought under Colorado and Federal statutes and regulations providing generally for the education of handicapped children at public expense. CDE is the SEA designated for the administration of Federal funds under the Act. The Federal Regulations are framed generally in terms of requirements with which State plans must comply in order to qualify for the Federal funding. Thus, although the specific proceeding is pursuant to the State Plan, it is primarily governed by Federal law. The review is governed generally by 34 CFR §300.510 and 20 USC §1415(c). Those provisions charge the officer conducting State level review for the SEA with responsibility to examine the entire record, insure consistency of the proceedings with due process, seek additional evidence if necessary, afford the parties an opportunity for argument, and make an independent decision upon completion of review. The standard is relatively broad and permits the notation or observation of additional facts. It does not, however, alter the well-established principle that the findings of the trier of fact, who heard the evidence and observed the witnesses, are to be upheld unless clearly contrary to the evidence. The I.H.O. was in a unique position to determine the credibility of witnesses and the weight to be given to the evidence, including the weight to be afforded expert testimony. The record here generally supports the I.H.O.'s evidentiary findings, and the A.L.J. will not disturb them. The A.L.J. has also made additional findings on some matters, either apparently undisputed or otherwise clearly apparent from the record, on which the I.H.O. made no specific findings.

SUMMARY OF FACTS

The I.H.O. made findings of fact, some undisputed and some based on conflicting evidence. Since those findings are supported by the evidence, they will not be disturbed. To the extent pertinent, the A.L.J. adopts and incorporates the evidentiary findings set out on pages 6-18 of the I.H.O.'s decision by reference. The A.L.J. here summarizes and sets out those facts found by the I.H.O., found by the A.L.J. as undisputed or apparent from the record but not included in the I.H.O.'s findings, and describing the proceedings before the I.H.O. which are necessary to an understanding on the issues and of this decision. The summary is organized by the sections and must be considered as a whole for complete understanding.

I. GENERAL BACKGROUND ON CHRONOLOGY

The Child was almost 18 years of age, and completing his junior year at Boulder High, at the time of the hearing before the I.H.O. He was identified as handicapped when in first grade, in the spring of 1978, and received special education services funded under the EAHCA and the ECEA continually through the 1984-85 school year, when he finished eighth grade. He spent the next two academic years at Kildonan, a private school in the state of New York, with expenses paid primarily by his mother's father. He returned to the District, being enrolled at Boulder High, in the fall of 1987. The principal reason expressed by the Mother for his return was that she and her family could no longer afford to keep him at Kildonan.

In the fall of 1987, the Petitioners brought a civil action in the U.S. District Court for the District of Colorado (Case No. 87-C-956) seeking reimbursement under the EAHCA for tuition and costs they incurred at Kildonan. The District moved for summary judgment on the basis of failure to exhaust administrative remedies. The Federal Court denied the motion but held that the action would be dismissed unless Petitioners commenced administrative proceedings by a specified time. Petitioners commenced the administrative process within that time by filing a letter requesting a hearing before an I.H.O. The I.H.O. held that the District had failed to comply with the requirements of the Act and applicable regulations, but denied reimbursement because Kildonan was not approved by CDE. Petitioners appealed and the District, in its delineation of issues, challenged the I.H.O.'s conclusions which were unfavorable to it. Both sides claim both substantive and procedural errors.

II. THE CHILD

A. Condition

The Child is physically healthy but has handicapping conditions in both the learning and behavioral areas. During most of his time in special education, he has been classified as handicapped in both P/C and SIEBD categories. The learning disability principally appeared in the areas of reading and mathematics, but has also affected his performance in other academic areas which involve extensive reading. It is generally described as a form of dyslexia, i.e., difficulty in perceiving written material accurately. Although dyslexia can take many forms, the Child's disability apparently includes the tendency to reverse some letters both in writing and perception. Testing of the Child has consistently shown performance I.Q. scores at or above average and verbal I.Q. scores well below average, resulting in full scale I.Q. slightly below average. According to District tests near the end of his last year in the District's special education programs, the child was almost five years below grade level in reading and four years behind in math. Testing during the summer (admissibility of which was subject to claims of procedural error) showed similar, although somewhat lower, results. I.Q. testing performed in January 1984 showed a discrepancy between performance and verbal scores of 12 points, indicating a significant perceptual disorder.

The Child's behavior has been regarded as a problem by teachers, administrators and others involved with the school periodically and in varying degrees with severity throughout his time in the District. This was frequently manifested in hitting other students or creating disturbances which caused him to be referred to the principal's office. Although he was not classified as SIEBD in all of his years in the District, his I.E.P.s regularly addressed social and emotional as well as academic problems. In his latter time in special education, the Child often acted disruptively in order to avoid being required to read in classes in which he was "mainstreamed" (included with regular students). Between the times of his return from Kildonan and of the hearing, he had a high rate of absence, particularly in one class.

The interrelation of the Child's academic and behavior difficulties, and the emphasis placed on each, are discussed more fully in subsequent sections of this summary.

B. School History and Performance

The Child spent his first five school years at Whittier. His first grade teacher referred him for special education consideration in February of 1978 and, after studies and evaluation, at placement meetings (staffing) including all involved professionals and the Mother, he was identified as handicapped in June of that year and given an I.E.P. to be implemented the following fall. He remained at Whittier, with I.E.P.s varying in scope, intensity and inclusions in the diagnosis, through his first five years. Although his academic performance was consistently below grade level in most subjects, he was promoted each year. Throughout his school career, the Child has been, or has been described as, fearful of having to repeat a grade. While he was at Whittier, he was fearful of having to leave that school. Among the Child's main concerns was humiliation in being looked upon as "dumb".

In his sixth grade year (1982-83) the Child was transferred to Foothill because the services required for his I.E.P. were not available at Whittier. Again, he performed below grade level and was advanced. He spent his seventh grade year at Centennial, receiving low but mostly passing grades in a mixture of regular and special education classes. He was kept at Centennial during the academic year when his parents moved, but his overall seventh grade experience was not pleasant. The following year, 1984-85, he attended eighth grade at Platt, the regular school for his new residence. At Platt, again, he received passing grades in most courses while taking a mixture of regular and special education courses. Behavioral problems by this time included a continuing pattern of referrals to the principal's office (frequently for class disruptions before being called upon to read), and (according to reports in evidence but not specifically found by the I.H.O.) frequenting tunnels under the school, calling teachers names, losing his temper, taking items from a shop teacher, and "general mischief".

The next two years, ninth and tenth grades (freshman and sophomore in High School) the Child attended Kildonan. The program at that school is more fully described in another section of this summary. He passed all subjects, although his overall grade average was below the "C" (presumably average) level. Test records from Kildonan reflect improvement in some academic areas, ranging in reading from near grade level in word recognition to slightly over four years below grade level in spelling and to approximately three years below grade level in math, although the same tests show a drop in level during the second year. The Child's level of self-confidence and enjoyment of learning improved as well as his performance.

The Child entered Boulder High at the 11th grade (Junior) level in the fall of 1987, after his return from Kildonan. The I.H.O. noted in his findings that the Child was performing at a below average level at Boulder High since his return. The A.L.J. has reviewed the records to complete the survey of the Child's academic performance to the time of the hearing. The Child has failed, or withdrawn failing from, most of his courses. Excessive absences (including 46 in one class during 1987-88) may have contributed. The Mother refused suggestions to place him in special education courses within the District.

C. Special Education History

1. Prior to 1984 Triennial Review

The first staffing for the Child was held on June 7, 1978, at Whittier. Between the initial referral in February and the staffing, he was given a series of academic and psychological tests and evaluations. The Mother was present at the staffing along with school personnel. She signed a form authorizing placement of the Child in special education which included a recitation of the appeal procedure and acknowledgement of receipt of a separate brochure on student and parent rights. The Child was identified as P/C and SIEBD and given an I.E.P. providing for some time in a resource room to assist him with difficult areas. His I.E.P.s were similar the following two years, with mixed results. Each time, the I.E.P. and changes were developed in an annual review staffing based primarily on past plans, reports and performance records.

The first triennial review staffing for the Child was held in the spring of 1981 with evaluation, testing, and reports pre-prepared. The participants in the staffing observed and acknowledged that his reading, spelling and math performances were well below grade level by both academic results and standardized testing. As a result of the staffing, his I.E.P. was changed to provide for instruction in a self-contained classroom, particularly for reading, spelling and math, rather than the less intensive resource room in which a child receives help with regular assignments. The only condition listed on the I.E.P. was P/C and none of the specific goals related to behavior. On this and other I.E.P.s, those goals which were stated in terms of improving grade level performance gave an objective which was below grade level, although less so than existing performance.

The annual review report the first year after the review staffing stated that the Child seemed to be learning more in the self-contained setting and recommended it for the following year. It also recommended mainstreaming in math because the Child was closer to grade level in that area. His I.E.P. was changed accordingly. In 1982-83, at Foothill, his teacher generally gave a favorable report on his progress, particularly behaviorally, but his grade level scores were lower or no better. His I.E.P. for the following year -- his first in Junior High -- reduced the time of self-contained classroom from 15-20 to 10-15 hours per week, and he was kept in the regular math classroom. During that year, the Child had frequent behavioral referrals to the principal's office and was described as having difficulty with accepting supervision. His grade-level scores at the end of the year ranged from approximately two years below grade level in math to four in most reading areas. The scores reported on different types of tests varied, to a point were the I.H.O. noted that it was difficult to compare scores to determine the extent of benefit or progress the Child was realizing from his educational program.

2. 1984-85 Triennial Review and Following Year

The second triennial review staffing for the Child was held in the spring of 1984, with the Mother authorizing testing for that purpose in January. He underwent testing for psychological, speech/language, and adaptive behavior evaluations as well as a series of cognitive or academic tests. The triennial review staffing was held on February 27, 1984, resulting in an extensive needs assessment and listing of services required to meet needs. This assessment was incorporated into an I.E.P. developed at the next annual review on May 14, 1984, to be implemented when the Child moved to Platt in the fall of that year. The I.E.P. provided for delivery of services by 15 hours in the resource room, rather than self-contain classroom.

The Child's performances deteriorated during 1984-85. Testing in late April of 1985 showed him at the grade levels set forth below. The whole number represents the year and number after the decimal represents the month of school year, so at the time of testing in the eighth month of the eighth grade the Child's appropriate level was 8.8:

SUBJECT OR AREA	TEST*	LEVEL	DEFICIENCY*	PERCENTILE*
A Math		4.7	-4.1	
Reading	Word Attack	3.1	-5.7	8
"	P. Comp.	3.6	-5.2	5
"	W. Comp.	4.4	-4.4	10
Total		4.2	-4.6	6

* Key: Tests are all standardized. Reading tests apparently Woodcock-Johnson series; "P. Comp." is passage comprehension; "W. Comp." is word comprehension. "Deficiency" is the difference between the grade level in which the Child performed on the test and 8.8.

III. THE KILDONAN PLACEMENT

A. Events Leading to the Placement

At the end of the 1984-85 school year, the Mother sought the advice and assistance of her father, a physician in New York City, regarding the Child's continuing problems. He arranged for an evaluation by Dr. Rosa Hagin, a psychologist specializing in learning disabilities. Dr. Hagin saw the Child on July 11, 1985, and subsequently issued an extensive report. She concluded that the Child had dyslexia, which she described as a specific language disability. She concluded that the District's programs had not made much progress on his problems, and perhaps had not reflected understanding of them. She recommended that he be placed either at a boarding school or a day school for dyslexic students. She listed three boarding schools (including Kildonan) and one day school, all in the east. She also listed references for possible suggestions for specific schools closer to the Child's home. She set out several activities illustrating the type of schooling she believed he needed.

After receiving the report, the Mother called Dr. Lydia Swize, Executive Director for Instruction, responsible for special education in the District. The Mother referred to Dr. Hagin's report and asked for changes in the Child's program based on it. Dr. Swize refused. After that conversation and a brief attempt to find placement in Colorado, the Mother and the Child went back to New York and visited the four schools suggested by Dr. Hagin. By that time it was late August and near the beginning of the school year. The Child was then enrolled at Kildonan with the financial assistance of his grandfather.

B. Program and Accreditation of Kildonan School[1/]

Kildonan is a privately operated and funded school located in Amenia, New York. It is a residential or "boarding" school in which the students live on school grounds subject to rules and supervision of school personnel. The costs include room and board as well as tuition.

Kildonan was established and is operated strictly as a school for dyslexic children of average or above average intelligence. Personnel of the school use a method known as the "Orton-Gillingham Approach" with the aim of helping students integrate different aspects of the language function. Its teachers are English majors trained in that approach. The school initially grew out of a camp for dyslexic children. The school limits enrollment to approximately or slightly over 100 students per year.

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3. The 1985 Staffing and 1985-86 I.E.P.

The parents were notified of the spring 1985 staffing by a printed form letter issued by the special education teacher. The letter stated the date, time, place, and purpose of the meeting, encouraged participation and invited questions. It did not identify who would be present at the meeting and did not describe the procedure or the parents' rights. The Mother acknowledged that she received a brochure describing parents' rights at the time of the initial staffing and signed statements and staffing reports acknowledging that she had been informed of her rights. She also stated, and the I.H.O. found, that she felt overwhelmed by the proceedings and believed the reference to being informed of her rights related to the brochure which she was initially provided. It is also clear from the evidence that the Mother regularly and actively participated in the proceedings although she was in the position of looking to the District to provide services for her son and did not purport to know what services were or were not appropriate.

The Child's 1985-86 I.E.P. was prepared at a staffing held on April 24, 1985. The Mother attended and signed the report. The I.E.P. increased intensity of services over the previous year by designating 15 to 20 hours per week in a self-contained classroom rather than 10 to 15 hours in a resource room. It was, however, written in much less detail then the prior plan, both in the identification of needs and description of services to be provided to meet them. I.H.O. set out a detailed comparison of the 1984-85 and 85-86 I.E.P.s on pages 12-15 of his decision. That detail need not be and is not repeated here. The 1985-86 I.E.P. generally included the needs, goals and services identified in the 1984-85 I.E.P. but did not describe the needs or goals or how the goals were to be met in detail. The evidence also showed that, with one exception, the goals of the 1984-85 I.E.P. were not met. The 1985-86 I.E.P. apparently did not address additional behavioral problems which had become apparent earlier in that spring.

At the time of the staffing there was discussion of placement of the Child in the Halcyon School, a day treatment center for disturbed adolescents operated by the District. The Mother opposed this suggestion. Documentation from the staffing did not mention discussion of the Halcyon School and also did not mention the Mother's expressions of dissatisfaction with the District's progress of the Child to date.

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According to an affidavit from its Director of Language Training, Kildonan is chartered as a college preparatory school and holds membership in an independent school association but has not applied for certification as a special education facility by the State of New York. The declared reasons for the lack of application are that two requirements for state certification would hinder its mission: (1) accepting students with learning disabilities other then dyslexia and (2) different training for special educational instructors which Kildonan sees as not effective for dyslexics. As of June 1989, Kildonan had accepted approval for EAHCA funded placement by the special education departments of four states on an experimental basis, in each case obtained for one student. Approval involved inspection and other steps for advance approval in the case of at least one state (California).

Tuition at Kildonan is $17,500 per year, including education costs, room and board. Additional expenses associated with the school include clothing to meet dress requirements, costs of activities and other living expenses. The above-referenced affidavit estimated annual costs at approximately $23,000. The I.H.O. found expenses of $37,300 for the two years, but the Mother testified to greater expense saying that she did not then have the supporting documents. On re-examination the documents presented show actual expenditure and obligation of $28,300 for approximately one and one-half years of schooling (because one of the checks in one exhibit partially paid a bill which was another exhibit). Inferences from costs would support additional expenditure of at least $8,000. As explained more fully in a subsequent section, even the lowest estimate is almost $15,000 per year higher than the basic cost for educating a student in Colorado and also substantially higher than the cost of residential placement in this state.

C. The Child's Performance and Benefit

The I.H.O. found that the Child benefited from his schooling at Kildonan. Testing showed that the gap between his grade level at school and the level at which he performed narrowed, although he was still below grade level when he left Kildonan. His ability to read and write, penmanship, and math performance improved, as did his self-image and, at least as reported by Kildonan, his behavior. The progress shown on testing in the same areas at Kildonan is shown on the following table, with the chronological grade level noted in parentheses after the date of test and discrepancies noted with each score.

TEST DATES AND LEVELS

AREA	9/85(9.1)	5/86(9.9)	9/86(10.1)	5/87(10.9)
Word Recog.*	4.1(-5.0)**	6.9(-3.0)	4.9(-5.1)**	10.1(-0.8)
Gray Oral Reading	3.7(-5.3)	4.9(-5.0)	4.2(-5.8)	7.3(-3.6)
Silent Reading Vocab.	4.0(-5.0)	5.2(-4.7)	6.7(-3.3)	6.0(-4.9)
Comprehension	2.8(-5.2)	4.7(-4.2)	4.2(-5.8)	5.6(-5.3)
Speed	3.0(-6.0)	4.4(-5.5)	6.2(-3.8)	5.1(-5.8)
M-Spelling	3.3(-5.7)	4.5(-5.3)	4.2(-5.8)	6.6(-4.3)
Math Comp.	5.0(-4.0)	6.4(-3.5)	6.2(-3.8)	4.3(-6.6)
Math Reason.	5.6(-3.4)	5.8(-4.1)	7.5(-2.5)	6.8(-4.1)

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* Scores are noted by the number followed by either "B" or "E", which are taken as indicating either beginning or ending of the year and accordingly assigned either first or ninth month.

** Since only nine months are represented, discrepancy is calculated as though the level was ".0" instead of ".1".

Comparison of only beginning and ending scores shows that in all categories except math the Child improved by more than two grade levels in his two years at Kildonan. In all but two areas he regressed during the summer between the two years, showing a lower score when he returned in the fall than at the end of the previous school year. The score summary sheet indicates that the level of testing may have been raised in math, although that by itself would not explain a lower grade level score.

As noted, the Child received below average grades at Boulder High, including failure in several subjects and a large number of absences. He has not been in special education since returning to Boulder and thus has been taking all regular classes for the first time since first grade. There is no evidence concerning any grade-level test results since the child has been at Boulder High. Even though the discrepancies were less and the improvement exceeded previous performance, he was still performing below grade level in all areas tested when he finished Kildonan. Thus, his record at Boulder High does not necessarily indicate regression or lack of benefit from Kildonan.

IV. AVAILABLE DISTRICT AND COLORADO PROGRAMS

A. Services Provided and Available in the District

The services which the District actually provided to the Child are generally described in the section on his special education history and experiences. Those services consisted of time provided by special education teachers in either self-contained special education classes or resource rooms, for varying times from year to year. The amount of time in special education varied from all non-academic classes in fifth grade down to one half to one hour per day in the resource room in the second through fourth grades. In the later years special education occupied approximately half the Child's school time. Although the I.H.O. made no findings about the specialties or qualifications of the teachers assigned to the Child, resumes indicated that at least two worked predominantly with learning disabled or P/C students. These included Penny Neu-Carlisle, special education teacher at Platt in 1984-85. Her description of the work she did with the Child not only did not mention the dyslexia, it appeared not to include any work with problems of misinterpreting or reversing letters which had been noted in previous evaluations by District personnel, or any other of the problems later noted by Dr. Hagin. The I.H.O. characterized the Child's status after seven years of District programs as "miserable," and this characterization is clearly supported by the evidence. If the District had any programs within the framework of its regular school special education offering capable of meeting the Child's needs, it did not use them or produce any evidence to show that they existed.

There was some evidence concerning the Halcyon School, which the Mother had rejected when suggested at the last annual review. Halcyon was described as a therapeutic as well as educational setting for Junior High-level students. Its principal testified that there is a low student-teacher ratio, allowing considerable attention for each student, and that there is programing available for P/C students. The Mother testified that her primary reasons for rejecting possible placement at Halcyon were the emphasis on behavior rather than learning and the presence of students with severe behavioral problems (probably including some drug users) who might have a negative influence on the Child. The I.H.O. made no finding and the A.L.J. makes no findings on whether or not Halcyon would have offered an adequate program for the Child.

B. Other Colorado Programs and Costs*

According to an expert witness called by Petitioners, there do exist, in Jefferson County and elsewhere in Colorado programs capable of meeting the Child's needs, including both P/C and SIEBD conditions. No specific schools or facilities were mentioned.

Based on the information provided by the Department at or about the time material here, the statewide average regular education costs per student per year (average revenue base or "ARB") in 1986 was approximately $3,150 per student, or $17.50 per day for a standard 180-day school year. The educational component of the cost of RCCFs, which typically provide psychiatric or behavior-related as well as educational services, as allowed by the department at about the same time was typically more than double the ARB. One RCCF lost almost four times as much, but still substantially less than the total charge at Kildonan.[2]

C. Petitioners' Inquiries

Petitioners received Dr. Hagin's report in early August of 1985 and enrolled the Child at Kildonan within less than a month thereafter. As noted previously, the I.H.O. specifically found the Mother's version of her contact with Dr. Swize to be accurate. He noted critically that the District did nothing after this conversation in response to the concern expressed. The same testimony, which was not contradicted, shows the sequence of relevant events. Petitioner received the report early in the second week of August and, after reading it, phoned Dr. Swize. After the conversation, she was not sure what course of action to take. She called her father, and made reservations to return to New York the following week. Before she left, the Mother spoke with Dr. Hagin on the telephone and called two schools in Colorado (one of which was identified as the Denver Academy) and inquired about programs for dyslexic children. She was told that each school contacted did not have such programs. She did not recontract the District and did not ask them to place the Child in an alternative facility or to pay for such placement.

The Mother and Child flew to New York on August 23, 1985. They visited all four of the schools mentioned by Dr. Hagin and chose Kildonan because it had immediate space available and appeared to be right for the Child. It was the least expensive of the boarding schools. She could not personally afford any of them.

After enrolling the Child at Kildonan, the Mother did not think of changing placement, or reimbursement, until after the child had returned to Boulder in 1987. After her initial inquiries, the Mother did not make any further investigation or inquiry into schools or programs available in Colorado. She did not at any time seek to obtain, nor ask the District to obtain, approval of Kildonan as a facility for placement of handicapped Colorado students. The evidence does not so much as hint that she was aware of any such requirement.

V. THE PROCEEDINGS BEFORE THE I.H.O.

A. Prior to Hearing

The steps which led to this proceeding are described generally in the procedural history section of this decision. The procedural regularity of the appeal by Petitioners and selection and qualifications of the I.H.O. have not been questioned. Both parties specifically waived time limits since the proceeding does not affect any current placement. The schedule for prehearing proceedings and the hearing was agreed upon between counsel and the I.H.O.

Counsel and the I.H.O. held a prehearing conference at the offices of the District on March 15, 1989. Both counsel had presubmitted prehearing statements in compliance with a prior notice from the I.H.O. On March 20, 1989, the I.H.O. entered a prehearing order, containing a recitation of the procedures, lists of undisputed facts and remaining issues of fact and law, references to witness and exhibit lists with dates for submitting supplemental material, and similar provisions for such orders. The order included, inter alia, the following provisions:

> (1) That the District would bear the burden of proof regarding provision of an F.A.P.E. in accordance with its Spring 1985 I.E.P., followed by a statement that the parents would bear the burden of proving that the Spring 1985 I.E.P. did not provide an F.A.P.E.;
>
> (2) That the parents would bear the burden to prove that the alterative placement Kildonan was appropriate; and
>
> (3) That the use of Dr. Hagin as a witness or of her report would be preconditioned upon counsel for the parent providing information which had been requested in a letter of February 21, 1989, from counsel for the District not later than April 5, 1989 (the deadline also provided for endorsement of additional experts).

The issues identified in the District's prehearing statement included reference to placement at a private school not approved by the State and whether parents can seek reimbursement for expenses incurred prior to the initiation of due process proceedings. Legal issues were broadly stated, but did include the preconditions that the parents had to satisfy in order to claim reimbursement.

The letter referenced in the order concerning Dr. Hagin's report requested information in five specified areas primarily addressed to data and information used in the test in process. At the time of the correspondence, both counsel had been informed that Dr. Hagin had been diagnosed with terminal cancer and might not be available for the hearing. Counsel was unable to provide the information, explaining at the hearing that Dr. Hagin could not produce it on request.

B. The Hearing

The hearing lasted four days, three for taking evidence and the last devoted to argument. The District presented its case first and presented five witnesses including, *inter alia*, the current Director of Special Education for the District, who is also principal of Halcyon School, and the Child's special education teacher in his last (eighth grade) year in the program. Petitioner presented three witnesses, including the Child and his Mother. The District called three new witnesses and recalled a prior witness in rebuttal. With one exception, no challenge has been made to the procedural aspects of the hearing.

Petitioners twice attempted to introduce Dr. Hagin's report, first in the testimony of their expert and later during the direct testimony of the Mother. The District objected. The I.H.O. sustained the objection on the basis of failure to comply with the prehearing order, although he did permit limited references to the report concerning data used by the expert as part of the basis for her opinion and regarding its effect on the Mother's state of mind. The I.H.O. refused to allow testimony concerning Dr. Hagin's opinions or to allow the report to be admitted for that purpose. The I.H.O. regarded the ruling as sufficiently significant to include a description of it, and its basis, in his decision.

C. The Decision

The I.H.O. issued his decision on May 17, 1989. After notations on procedural matters and the findings of fact, the I.H.O. reviewed pertinent portions of the EAHCA and recent case law concerning reimbursement. The I.H.O. then analyzed the Spring 1985 I.E.P. in terms of requirements of the EAHCA, the Rules and the State Plan. He concluded:

> (1) That the I.E.P. was procedurally defective in that (a) the notice failed to advise the parents of some of their rights and to give notice of who would attend the meeting and

(b) the I.E.P. itself lacked required documentation of determinations or events at the meeting, lacked the detail required by the State Plan, and failed to showed consideration of numerous requirements placed on the staffing/I.E.P. committees by State Plan;

(2) That the I.E.P. was substantively defective in that the District failed to meet its burden to show that it provided the Child a "basic floor of opportunity" to constitute F.A.P.E. within established case law;

(3) That, because of the substantive and procedural defects, the I.E.P. did not provide the Child with F.A.P.E.;

(4) That Kildonan was not an appropriate placement because it was not approved by the Department and thus did not meet the standards of the SEA by the I.H.O.'s interpretation of recent case law; and

(5) That because the placement at Kildonan was inappropriate, the parents could not be reimbursed for it even though the District did not provide F.A.P.E..

DISCUSSION AND CONCLUSIONS

I. IDENTIFICATION OF ISSUES

The principal and ultimate issue which both counsel recognized and argued was whether or not the parents were entitled, under the EAHCA, to reimbursement from the District for all or any part of the expenses of the Child's education at Kildonan, and consequently whether the I.H.O. erred in denying the request for reimbursement. Counsel in their arguments and the A.L.J. in his review of the evidence, arguments and authorities have identified the more particular issues set out below, all either subordinate or related to the principal issue, for resolution in this appeal. In view of the scheme of the Act including the contemplation of a comprehensive determination on State level review, the A.L.J. has resolved some issues strongly argued by the parties which were not immediately necessary to the outcome.

The issues identified are as follows:

(1) Whether the I.H.O. erred in holding that Kildonan was not an appropriate placement because it was not approval for reimbursement by the Department, including subissues:

(a) whether approval was necessary to meet the EAHCA requirement of meeting standards of the SEA;

(b) if not, what circumstances might be treated as equivalent to meeting the standards of the SEA without formal approval; and

(c) whether Kildonan met or could have met that requirement;

(2) Whether the I.H.O. erred in holding that the District failed to provide F.A.P.E. to the Child in 1985-86, including as subissues:

(a) whether the District met procedural requirements, particularly informing the parents their procedural rights, in development of the I.E.P.;

(b) if not, whether the I.E.P. was so procedurally defective as to be invalid or a failure to provide F.A.P.E.; and

(c) whether the I.E.P. was substantively adequate, i.e., whether, if implemented, it would have provided F.A.P.E. to the Child;

(3) Whether reimbursement is precluded by the Petitioners' undisputed failure to request it until after the Child had returned from Kildonan; and

(4) Whether the I.H.O. made procedural errors claimed by counsel and the effect, if any, of such errors, including the following subissues:

(a) whether the I.H.O. erred in excluding the report of Dr. Hagin;

(b) whether the I.H.O. erred in placing a burden of proof upon the District to show that its I.E.P. provided F.A.P.E. to the Child;

(c) what procedure is appropriate if the A.L.J. determines that either or both of the rulings was in error; and

(d) the effect of the error or errors, if any, on the outcome.

The A.L.J. has not included the issue, mentioned in the Order Denying the Request for Evidentiary Hearing, of the existence of approved schools which could have met the Child's needs and circumstances relating to any such schools. The A.L.J. initially determined that no evidentiary hearing would be necessary on that issue because Petitioners' own expert had acknowledged that schools existed in Colorado which could meet the student's needs, thus providing an answer to the broad question. It appeared to the A.L.J. in review of the record of briefs at that time that the evidence to be presented on the issue would not affect the outcome of the case and therefore an evidentiary hearing would be inappropriate.

II. GENERAL LEGAL FRAMEWORK

The purpose of the EAHCA and attendant regulations is to insure that all handicapped children have available to them F.A.P.E., including special education and related services to meet their needs. 20 USC §1400(c); 34 CFR §300.1(a). "F.A.P.E." is a term of art defined in 20 USC §1401(18) specifically as follows:

> The term "free appropriate public education" means special education and related services which:
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and
>
> (D) are provided in conformity with the individualized education program required under §1414(a)(5) of this title. (Emphasis supplied).

The Act and the regulations show recognition that residential placement may sometimes be necessary. 34 CFR §300.12 specifically provides that in that event, "the program, including non-medical care and room and board, must be at no cost to the parents of the child." Neither the Act nor regulations preclude residential placement outside of the state involved when the circumstances warrant it. See, e.g., T.B. v. Garfield School District #16, Case No. ED 87-03 (decided by this A.L.J.); McKenzie v. Smith, 771 F.2d. 1527 (D.C. Cir. 1985); Linkous v. Davis, 633 F.2d 1109 (W.D. Va. 1986); Parks v. Pavckovic, 557 F.Supp. 1280 (N.D. Ill. E.D., 1983). The educational agency is required to pay for private placement if it has not made F.A.P.E. available. See 34 C.F.R. §300.403, providing that a private placement is at the expense of the parent if the child has F.A.P.E. available.

The Act, both Federal and State regulations and the State Plan (established pursuant to the Act), set out procedures for evaluation, staffing, and adoption and implementation of an I.E.P. with parental participation contemplated at each decisional stage and the right to a due process hearing provided. The U.S. Supreme Court emphasized the importance of procedural rights and following correct procedures in Hendrick Hudson Central School District v. Rowley, 458 US 176 (1982) ("Rowley"). The court in that case also generally defined F.A.P.E. as personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.

The Supreme Court has also made clear that parents can obtain reimbursement for alternative placement if the District has not offered F.A.P.E. and the placement for which the parents seek reimbursement is appropriate. School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 US 359 (1985) ("Burlington"). The Court there relied upon a general provision in 20 USC §1415(e)(2) authorizing a reviewing court to "grant such relief as the court determines appropriate." The Court rejected the argument that 20 USC §1415(e)(3), the "stay-put" provision, which generally requires that a child remain in the existing placement pending appeal, would not defeat reimbursement when the placement offered by the LEA was inappropriate. The practical effect of the Burlington decision is that unilateral parental placement pending appeal is at the parents' financial peril. The parents may obtain reimbursement if the District's placement is inappropriate and the alternative used is appropriate, but may not be reimbursed if the District has offered an appropriate placement. The Burlington Court also held that the questions of whether to order reimbursement, and in what amount, was to be determined by balancing equities.

III. HEARING PROCEDURAL ISSUES

The hearing procedure affected the manner in which the case was presented and the record developed, and the resolution of those claims of error thus affect consideration of the substantive issue. Therefore the A.L.J. considers those issues first.

A. The Burden of Proof

The I.H.O.'s prehearing order stated that the District would bear the burden "regarding provision of" an F.A.P.E. in the Spring I.E.P., and then stated that the parents would bear the burden to prove that I.E.P. did not provide F.A.P.E. Thus on its face the order appeared to place a burden on each side to prove its contentions concerning the appropriateness of that I.E.P. In his decision, the I.H.O. stated that, "given the poor documentation of goals, objectives and services," the answer to whether the I.E.P. met the Rowley test of F.A.P.E. was, "We don't know!" The I.H.O. held that, therefore, the District had failed to meet its burden. The District contends that the I.H.O. erred in placing the burden on it on this issue. It urges the A.L.J. to reject the I.H.O.'s reasoning on substantive compliance of the I.E.P. with the Act for this reason.

The EAHCA, at 20 USC §1415, sets out procedural safeguards for those affected by the Act, including the right to, and rights to be afforded in, an impartial due process hearing. It is phrased generally in terms of the procedural rights to be afforded parties in the hearing and is silent as to the burden of proof. The rights described -- e.g., presenting evidence, cross-examining witnesses, proceeding before an impartial officer and the like --are consistent with those provided in the A.P.A. and in the Federal A.P.A. (5 USC §1001 et seq.). The State Plan is phrased in generally similar terms to the Federal statutes and regulations, and is also silent on the subject of burden of proof. Even though it is based on Federal requirements for the administration of Federal funds, this entire proceeding is most immediately conducted on behalf of CDE, an agency of the State of Colorado. Absent conflicting specific provisions, the A.P.A. applies. See C.R.S. §24-4-107. The A.P.A., at C.R.S. §24-4-105(7), places the burden of proof upon the proponent of an order. This and other A.L.J.s have consistently held that a party seeking to change the status quo, or one taking an appealed action which changes the status quo, is the proponent of the order and bears the burden. Petitioners sought the affirmative relief of reimbursement for unilateral placement of the Child notwithstanding his I.E.P. They were therefore, clearly the proponents of the order. Thus the I.H.O. erred in placing the burden on the District to uphold the I.E.P. (although requiring the District to proceed first to provide a full explanation of the case may have been sensible). Further, issuing an order apparently placing a burden on both sides on the same issue was facially erroneous as well as confusing.

The I.H.O.'s error in this regard was harmless. He analyzed the substantive compliance of the I.E.P. with the Act and State Plan thoroughly. With the extensive analysis of the I.E.P.'s shortcomings and the history of failure to provide adequate service documented in the evidentiary findings, it is almost inconceivable that the I.H.O. would have found the I.E.P. either procedurally or substantively adequate if he had placed the burden of proof on the issue solely on the Petitioners. As discussed in another section of this decision, that conclusion was fairly demanded, and not merely supported, by the evidence and the I.H.O.'s evidentiary findings. Further, any inability to determine whether the I.E.P. provided the Child with educational benefit resulted from the poor documentation of goals, objectives and services which was itself a procedural defect.

B. The Hagin Report

The I.H.O., in the decision, stated that he was faced with an "unfortunate dichotomy between an otherwise admissible document and a pre-hearing order" regarding the Hagin report. He allowed reference to the exhibit by the expert for specific data and by the Mother concerning her state of mind but rejected the report for general purposes. He characterized the case law cited by Petitioners as persuasive in favor of admission but deferred to the District's claim that it would be prejudiced without the opportunity to examine the basis of the witnesses' evaluation.

The I.H.O. either applied the wrong test or misapplied the appropriate test. Neither the Act nor the State Plan make reference to prehearing conferences or contemplate the effect of prehearing orders. The A.P.A., at C.R.S. §24-4-105(4), provides that insofar as applicable the procedures should be the same as cases tried to the court in District Court. Thus the effect of the prehearing order is governed generally by Rule 16, Colorado Rules and Civil Procedures ("C.R.C.P."). That rule provides that the order governs the course of the hearing except as modified to prevent manifest injustice. It gives the presiding officer discretion to vary from the order when appropriate. E.g., Francisco v. Cascade Inc. Co., 29 Colo. App. 516, 486 P.2d 447 (1971). Exercise of that discretion in a situation such as here involved necessarily involves balancing and must be exercised reasonably. Rigid adherence to the order regardless of the circumstances is not reasonable.

The I.H.O. declared that he would have admitted the report but for the prehearing order. Counsel for Petitioners declared at the hearing and on the record that he was unable, despite good faith efforts, to obtain the material requested because Dr. Hagin could not produce the information. Dr. Hagin herself was unavailable because of illness. The I.H.O. was not presented with a disregard of the order or lack of effort to comply with it. Circumstances apparently unforseen at the time the order was entered caused noncompliance. At that point it was incumbent on the I.H.O. to weigh the potential prejudice to the District from the absence of the information requested, as well as the lack of opportunity to cross-examine Dr. Hagin, against the importance of the report and the potential prejudice to Petitioners from not being allowed to use it.

In this case the balance was clearly in favor of admission. The District's lack of opportunity to explore the opinion in cross-examination to point out its limits or possible modification necessarily affected its weight. Dr. Hagin's evaluation and subsequent report clearly precipitated the Mother's demand for changes in the program and the transfer of the Child to Kildonan when the District failed to respond. Considering it is necessary in order to understand what the Petitioners did and why. Without it, the picture is one solely of what a frustrated parent's removing a child from a program which was not working and for some mysterious reason enrolling him in an expensive specialized school over a half of a continent away. While the limited references to the report allowed provided at least an explanation, understanding the parents' actions is difficult without the perspective of the report as a whole. On the other hand, the District claimed prejudice in the absence of the data it requested. That claim must be considered in context. The prejudice was minimal, especially since Dr. Hagin was not available for cross-examination in any event. The body of the report refers to tests and evaluations performed by or for the District as well as by Dr. Hagin. The tests on which she listed scores at the beginning of the report are standardized. None of the scores themselves varied sufficiently from the District's own to give reason to question their accuracy. The I.Q. tests were lower than the prior tests in the District's records, but were consistent with the trend of those scores. The remaining material was raw data concerning psychological tests not referenced by scores, information on social and emotional issues considered, and whether a continuous text was used. Some can be gleaned clearly from the report and the remainder are primarily matters for cross-examination (impossible anyway) or comment by District experts. Since Dr. Hagin was not available to testify the District had an inherent advantage before the trier of fact of live testimony weighed against an otherwise unexplored written report. Considering all the circumstances, the prejudice to the District from not having the data was relatively minimal and the I.H.O. erred by not exercising his discretion to admit the report.

As with the misallocation of the burden of proof, the error was harmless and would not require remand in any event. The EAHCA, at 20 USC §1415(c) and the regulations, at 34 CFR 300.510, empowers the A.L.J. as reviewing officer to consider the entire record, and take additional evidence if necessary. This mechanism affords an opportunity to resolve the case at the State level without the need for remand. Since the evidence involved was documentary, the obvious appropriate treatment is for the A.L.J. to consider the evidence along with other evidence in the record and the findings of the I.H.O. in reaching the decision on review. The A.L.J. has done so. The result does not, by itself, require, reversal of the I.H.O.'s decision. The principal effect of the Hagin report is to bolster the I.H.O.'s conclusions that the Spring 1985 I.E.P. did not afford the child F.A.P.E. While it assists in explaining the choice of Kildonan, it does not relate directly to the appropriateness of Kildonan as a placement under the EAHCA or the reimbursability of the expenses of that placement. The portion of the report which contains recommendations listed Kildonan and other schools, all in the eastern United States. Dr. Hagin then stated that she had listed those schools as examples of the type of program needed and suggested potential contacts for information about schools closer to home. Dr. Hagin then proceeded to specify aspects of the program and illustrations of activities she believed the Child needed. The Mother evidently referred to those features in her subsequent conversation with Dr. Swize. Thus, the error of excluding the report was harmless and the A.L.J. has, in any event, cured it by considering the report in the issuance of this decision.

IV. PROVIDING OF F.A.P.E. BY THE DISTRICT

A. Context for Considering 1985 I.E.P.

Petitioners cannot obtain reimbursements for their alternative placement of the Child if F.A.P.E. was available to him through the District. The necessary test, in context, is therefore whether or not the District offered or made available F.A.P.E. to the Child at the time his parents placed him at Kildonan. If so, Petitioners would not be entitled for reimbursement and other issues would be moot.

The placement at Kildonan occurred in the fall of 1985, when the I.E.P. adopted the previous spring was to take effect. Thus, focus must necessarily be on the correctness of the I.H.O.'s conclusions that that plan was procedurally and substantively defective and did not provide F.A.P.E. to the Child. The issue cannot be considered in a vacuum, however. The Child had spent seven years in the District's special education programs before the 1984 I.E.P. was adopted. That history was clearly a part of the setting within which the plan was formed and of the framework in which it was viewed both by Petitioners in deciding to remove the child from the District and by the I.H.O. in evaluating it. Historical context is also necessary to the determination whether the plan made F.A.P.E. available to the child. In fact, the history was a record of practice as well as theory concerning what might work for the Child. A plan with components which have worked with others which professionals believe would work may be appropriate for a child new to a system or to a special education experience. For a child already in the system, prior experience can show what does or does not work and assist in a more accurate diagnosis of the child's conditions and needs. Indeed, building on experience is normal in almost any venture and usually an aspect of any form of progress. An otherwise appropriate approach may not be appropriate if it repeats what has failed or does not address an appropriate diagnosis. To make or evaluate a plan out of context can, in many incidences, lead to repetition of failure.

B. Criteria for Evaluation

In Rowley, the Supreme Court held that a state satisfies the F.A.P.E. requirement if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. The Court rejected the contention, which the lower Court had accepted, that the Act required programs to maximize each handicapped child's potential. The Court instead construed the Act to require that handicapped children be given a "basic floor of opportunity" commensurate with the requirements of equal protection (U.S. Const. Amend. 14). 458 US at 200. The Court also emphasized the importance of procedural safeguards under the Act, particularly affording rights to parents and providing for their participation in the process.

C. Procedural Compliance

The I.H.O. compared the procedure involved in developing the Spring 1985 I.E.P. step-by-step with requirements of the State Plan. The District first, and correctly, contended that the I.H.O. erroneously referred to the current (1989-91) State Plan and not the 1984-86 plan which was then in effect. The A.L.J. obtained appropriate portion of the 1984-86 plan and evaluated the process under both.

The I.H.O. first found that the notice was inadequate in that it did not mention opportunity to examine records, procedures for the conduct of staffings, or who would attend the meeting. He correctly identified the omission. As the District pointed out, the 1984-86 plan [(at Part VI B(5)] did not require specific notice of the right to review records. It did, however, require notice of procedures for conducting a meeting and [at Part V. B2(a)] notice of who would attend the meeting. The notice of the Spring I.E.P. conference did not comply with either of these requirements. The defect was not fatal, however, in light of history. The Mother had participated in staffings and review meetings for seven years and must have been aware of the procedures and must have anticipated who would attend.

Inadequacy of written notice was not the only defect. The I.H.O. clearly accepted the Mother's testimony that she always felt overwhelmed by the proceedings and relied on the staff, and actually received the written advisement of her rights only at the time of the first staffing in 1978. This defect was clearly serious in that it left the Mother aware only vaguely, if at all, of the steps available to her if she disagreed with the plan or found it inadequate. Considering the state of being overwhelmed which the I.H.O. found, the defect may well have tainted the entire plan by leading the Mother to believe she had to accept what was proposed by the District's specialists. In view of the evidentiary findings, the District's contention that the Mother acknowledged notice of her procedural rights at each staffing by signing the report form is unpersuasive.

The I.H.O. next set out a series of functions of the staffing committee provided in the State Plan, and assessed the compliance of each with the I.E.P. The I.H.O. quoted 13 requirements set out in the 1989-91 plan. The 1984-86 plan separately identifies 11 requirements, some of which are stated in less detail then those quoted in the decision. See Part V. B(3)(b). That plan also sets out a separate, and considerably less comprehensive, set of requirements for annual review staffing. Part V. B(8)(b). The District argues that the I.H.O.'s analysis -- which includes substantive as well as procedural references -- is invalid for that reason.

No detailed analysis is necessary. The annual review requirement is, in essence, to review the key features of the prior I.E.P., make appropriate changes if necessary, and establish projected dates and duration of services. Triennial review staffings must meet the same requirements as the initial staffing. Since the last triennial review had occurred in 1984, the task of the 1985 meeting was to review the 1984-85 I.E.P. and make appropriate changes as necessary. The contemplated result was an I.E.P. meeting those comprehensive requirements set out in the decision which were also included in the 1984-85 plan, reviewed and updated as appropriate. Most of the professionals who developed this I.E.P. had not been involved in the development of the prior I.E.P. which they were reviewing and updating. Thus, a more comprehensive review might well have been warranted.

The I.H.O. was correct in finding the plan procedurally deficient. Of most importance was the relative vagueness of the program and the lack of any apparent attempt to address three major issues: additional behavioral problems brought to the committee's attention before the meeting, the growing history of failure to provide significant assistance to the Child, and the Mother's expression of dissatisfaction with the District's performance to date. The State Plan sets out extensive requirements and calls for specific statements of needs and services to be provided. The circumstances here involved fairly begged for particular care and careful documentation. Instead, the committee shortened the I.E.P. and made it vague and also eliminated some features without explanation. When the circumstances called for careful compliance with procedural requirements, the District left an impression of being cavalier, or perhaps too weary of dealing with this Mother and Child to devote the necessary care to meet his needs.

In August 1985, after receiving Dr. Hagin's report, the Mother called Dr. Swize and requested changes in the Child's program as suggested in Dr. Hagin's letter. The I.H.O. specifically found, based on conflicting evidence, that the Mother requested a change of program at that time. The I.H.O. noted in the Findings of Fact that "one must question" the District's response (to do nothing except declare that no changes would be made). The I.H.O. suggested that follow-up inquiry, correspondence, review and written advisement of rights would have been appropriate. The request for change of program required the District to provide notice of procedural safeguards. Beyond noting that requirement, the I.H.O. did not address whether the District's response complied with procedural requirements. 34 CFR §300.504(a)(2) specifically requires written notice to the parent when the agency refuses to initiate a change in placement. Undisputedly, no such notice was issued. Neither the regulations nor the State Plan specifically require a staffing or meeting when a parent requests a change in the I.E.P. The entire scheme of procedural safeguards, however, is designed to assure parental participation and protect the rights of parents and children. Regulations and the State Plan do require that I.E.P.s be reviewed periodically, and changed as necessary. 1984-86 State Plan Part V. B(8); 34 CFR §300.343(d). These provisions specifically require review at least annually. Here, however, the District was presented with a request for major changes following an independent evaluation. Absent unusual circumstances, it is difficult to see how those circumstances would not make further review and consideration of change necessary, especially since the regulations require written response to a request for change. Further review or staffing might not be necessary, at least a failure to act might be reasonable, where the same or similar changes have been requested and rejected before, a similar evaluation had already been presented, or a request was simply part of a general complaint. Nothing in the record suggests this is the case, however. It is apparent that clashes occurred, and some District personnel may have found the Mother irritating or considered her a chronic complainer. Failure to respond under these circumstances, however, is indeed difficult to understand. The I.H.O. appropriately criticized the District for doing nothing in response to "this frustrated woman's cry for help." It also violated her procedural rights in view of the clear purposes of the regulations. The resultant refusal to change, or to consider changing, the spring 1985 I.E.P. was another instance of noncompliance of that I.E.P. with procedural requirement of the EAHCA.

D. Substantive Compliance

The overriding feature of the Spring 1985 I.E.P. was that it proposed to continue, and mildly increase, a program of services which had not worked and which there was no genuine reason to believe would work. On paper and without considering history, the Spring 1984 I.E.P. (developed after the last triennial review) provided for apparently appropriate services which might have provided educational opportunity to a learning disabled child with behavioral problems beginning, or at an early stage in, special education. An update, with similar detail and appropriate changes, might have created the same appearance the following year. Neither would be even remotely related to reality in the case of this child, however. Objective data available to the staffing committee showed that the Child was of normal intelligence, had a significant discrepancy between performance and verbal I.Q. and could not perform even to half his chronological grade level in reading and barely to that stage in math. Although there was some fluctuation from year-to-year, the grade-level discrepancy generally increased each year. Such a performance might be expected and generally represent the best that could be done with a child of low intelligence or limited capacity. That was not the case here, however. The Child had been in the system and receiving the "benefit" of the District's special education program for over seven years, almost his entire school career. The District's efforts had accomplished little or nothing in either correcting or providing compensation for his learning disability.

It is clear from the evidence and the I.H.O.'s findings that the District had failed, repeatedly and miserably, to help the Child to any significant extent. A need for some kind of drastic change was probably apparent several years before the spring of 1985. It still existed then, however. By that time the discrepancy between the Child's learning level and grade level was continuing to increase and, as well, his behavioral problems were becoming more serious. Nevertheless, those in the District responsible for his education were apparently either unable or unwilling to acknowledge that their own efforts had failed. In turn, they were either unable or unwilling to try any distinctly different approach or to look for a program to which to refer the Child which might work for him. If what the District had offered before, and proposed to continue, was a basic floor of opportunity, it was a shaky floor indeed. The reality is that the District had not served the Child effectively and the Spring 1985 I.E.P. was the latest in a series of programs which failed to recognize or deal with that reality. In view of the District's performance and apparent attitude, the wonder is not that the Mother removed the Child from the District, but that she waited so long to do so.

The A.L.J. is aware that limits exist to what a special education program can do for any child. The A.L.J. does not suggest as a standard of F.A.P.E. that a child reach grade level, or even maximum potential. An LEA is responsible, however, for a good-faith effort to find and use an approach which will work, and to acknowledge inability to help when that is the case. It is logical to expect an effort to change an approach when it is failing, find errors, experiment, and continue to look for a successful approach. To try nothing new in the face of an increasing gap between performance and level, and intensifying behavioral problems, implies that nothing more can be done. In this case, it was tantamount to an unspoken admission of failure.

The District's substantive failure to provide an adequate I.E.P. was compounded in 1985 when the Mother called Dr. Swize and asked for changes in accordance with Dr. Hagin's report. It is astounding that the District rejected the suggestions out-of-hand, and acted as though it had never heard the word dyslexia, in view of the its extended record of failure to serve the needs of the Child. The District was presented with a series of recommendations by a specialist in the field of learning disabilities, who had examined the Child, conducted tests, and reviewed what had been done before. Even if the District was skeptical of the suggestions, they afforded on their face a better opportunity than did the District's prior efforts which had demonstrably failed. Moreover, had the District either altered the I.E.P. to adopt some or all of the changes or, if its own personnel could not provide it, referred the child to another LEA or an appropriate residential placement, it would have made F.A.P.E. available. In such case, the District would have been offering the alternative which the parents eventually chose, namely the departure from a failed program on the advice of the parents' chosen specialist. It would then have to be regarded as making F.A.P.E. available. Instead, the District insisted on keeping in place a program which offered only a repetition of its failures. The Spring 1985 I.E.P. did not make F.A.P.E. available to the child and the District repeated that failure by refusing to alter the I.E.P. when requested to do so in August, 1985. The I.H.O.'s holding that the District did not offer F.A.P.E. to the Child at the time of the parents placed him at Kildonan was correct and must be upheld. The review leads to this conclusion for somewhat different reasons, and appearing even more clearly, than held by the I.H.O.

V. REIMBURSABILITY OF KILDONAN EXPENSES

A. Appropriateness Requirement

The Burlington, holding was based on the authority of the court under 20 USC §1415(e)(2) to grant such relief as it determines appropriate. Both the rules and case law interpreting this ruling make clear that the same relief may be granted at the administrative level. Indeed, a request for reimbursement is frequently the principal issue in hearings under the Act.

The Burlington court made clear that in order to be reimbursable the placement made by the parent must be itself appropriate, i.e., it must itself meet the requirements of F.A.P.E. Reimbursement is not available for a private placement made by parents which is not itself appropriate, even if the District does not offer F.A.P.E. to the child.

The statutory definition of F.A.P.E., which is set out in Part II of this portion of the decision (page 19), includes as a requirement that the placement "meet the standards of the state educational agency." The I.H.O. based his denial of reimbursement on this provision, holding that Kildonan did not meet the standards of the SEA, and was therefore was inappropriate, because it had not been approved by the Department.

B. The Need for Approval and Colorado Standards

The I.H.O. quoted and relied upon Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987), in holding that state approval was required to make a school appropriate. He also cited Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988), cert. den. 109 S. Ct. 133 (1988), and Tucker v. Bayshore Union Free School District, 873 F.2d 563 (2nd Cir. 1989). All three cases arose from states which specifically required approval by the Commissioner or Department of Education before a facility could be regarded as eligible or appropriate for placement of handicapped children of the state. Antkowiak and Tucker both involved schools which the Commissioner in New York had specifically declined to approve or which did not seek approval. The Virginia statute involved in Schimmel specifically provided that the State Department of Education could approve private facilities out-of-state only if no in-state facilities existed which could meet the child's needs. In those and similar cases, the requirement of approval was construed as the standard of the SEA within the meaning of the Act.

Colorado has a statutory scheme, under the ECEA, for contracting between local districts and administrative units for the provision of services not available in a district of residence by either other school districts or other public facilities. That provision requires approval of the contract by the State Board of Education for reimbursement. See C.R.S. §22-20-109. The 1984-86 State Plan contains provisions for placement in private schools. That provision sets out a procedure for local administrative units to contract with private schools to assure that the private schools meet the requirements of the Plan and the Act, including the employment of personnel meeting professional standards established by the State Board and meeting the requirements of each student's I.E.P. The policy also requires that the Department monitor local units to assure appropriate procedures and invite private school participation in the development and revision of standards. The State Regulations set up a plan regarding referrals, normally to public facilities, which appears to require Department approval of facilities and also to require Departmental approval for variance from the rules. The approval and contracting provisions are primarily concerned with financial arrangements between districts and assuring that facilities meet substantive standards for education and provide to the parents and children procedural rights required by the EACHA. The substantive standards are set out in a specific part of the State Regulations (1 CCR 301-8, 2220-R-7.0-7.09) There is no requirement of approval. It is apparent that approval is contingent upon meeting substantive standards and would normally be expected to occur if those standards were met. Approval is thus not a separate substantive standard.

Petitioners' brief described an approval process normally initiated by request by a school district, facility, or family concerning a pending or contemplated placement. For facilities in Colorado, the process normally involves a site visit, recommendations, review by the State Board and subsequent monitoring. Facilities in other states are normally approved if recognized as meeting their own state's standards. Out-of-state referrals normally occur only if no in-state placement is available to meet a child's needs. At the supplemental hearing in T.B., supra, the Director of Special Education for the Department described standards and procedures for out-of-state placements and approval. These include a general practice of approving facilities which are approved in their own states. In T.B., the issue was authority to place out-of-state, not approval as such. The A.L.J. in that case held that the facility involved was not ineligible for placement or precluded from reimbursement because it was located outside Colorado and that it was a reasonable inference that it met all CDE requirements since it was approved in its own state.

Tucker, Antkowiak, and Schimmel all presented issues beyond the absence of approval standing alone because the facilities involved did not meet state standards. None rested on the mere absence of formal approval. The school involved in Tucker (apparently one of those listed by Dr. Hagin other than Kildonan)[5] had apparently not sought approval because meeting necessary standards would require changes it did not wish to make. In Antkowiak, the placement had been approved by the LEA but was disapproved by the SEA because of apparent ongoing differences between the State Commissioner and the school concerning whether school policies met state standards. At the time of the placement, the school was approved only for children older than the one involved and the Commissioner had declared that he would approve no more placements there until the difficulties were resolved. That case was complicated by the fact that several approved schools refused to accept the child. In Schimmel, the school was not accredited for any purpose in its own state at the time of placement and was subsequently approved as a general school only. Further, three private in-state residential placements emphasizing the child's disability were specifically offered but rejected by the parents, and none were shown to be inappropriate.

Thus, neither the cases relied on by the I.H.O., upon careful reading, nor the EAHCA require that reimbursability rest solely on whether or not a formality of approval has occurred. Such a construction would place form over substance to an almost grotesque degree. The substantive requirement of the Act is that placement meet state standards. The inquiry must focus on that requirement, and not the absence of approval as a formality.

C. The Appropriateness of Kildonan

Petitioners' arguments and the materials they submitted illustrate concisely that Kildonan was not an appropriate placement on a substantive basis. The practice of the school was not the subject of any testimony and the affidavit presented from a source at Kildonan was not presented before the I.H.O. or subject to cross-examination. Counsel for the District urged the A.L.J. to disregard it. The affidavit would normally be disregarded, but considering it is appropriate at least to the extent that it relates facts adverse to the party presenting it. Similarly, Petitioners' argument concerning Department practices is consistent with evidence the A.L.J. heard in a prior case from the principal authority in the Department on the subject. Normally, such evidence would not be considered since the District did not participate in the prior hearing or it would be appropriate to take additional evidence to allow full exploration of the subject by counsel to this proceeding. Here again, however, counsel's assertions include statements adverse to his position which do not require an opportunity for counter-argument or cross-examination.

The requirement of the EAHCA is that placement meet state standards. The practice of the Department is that an out-of-state facility which meets the standards of its own state is normally approved absent some indication that it would not meet Colorado standards. Kildonan has not applied for, and has not planned to apply for, approval by the State of New York because such approval would require changes to conform with state standards which it is not willing to make. In this regard, the posture of Kildonan is remarkably like that of the school involved in Tucker. It is thus apparent that Kildonan does not meet the standards of, and is not approved by, its own state. Thus, the normal procedure would not result in approval of Kildonan in Colorado. An application, if made, could only have been approved through the process of site visit, reports, recommendations, review and monitoring which counsel for Petitioners described as not practical nor economically feasible. One reason cited in the Kildonan affidavit also (differing teacher training requirements) gives rise to a legitimate question whether its personnel would meet Colorado standards. Therefore, the evidence shows that Kildonan does not meet the standards of the SEA and placement at the facility was not appropriate. The specific reason expressed in the I.H.O.'s decision placed the emphasis in the wrong place, and appeared on its face erroneously to place form over substance. Nevertheless, his conclusion that Kildonan does not meet the standards of the SEA (in Colorado), therefore does not meet the definition of F.A.P.E., and therefore was not an appropriate placement, was correct and must be upheld. It follows that the parents are not entitled to reimbursement for the expenses of the Kildonan placement.

VI. BALANCING OF EQUITIES AND OTHER REIMBURSEMENT ISSUES

A. Appropriate Test and Principal Considerations

The Burlington, court noted that the Court of Appeals below had described the question of ordering an amount of reimbursement as "a question to be determined by balancing the equities" (471 US at 367) and concluded by stating its agreement that "equitable considerations are relevant in fashioning relief" under 20 USC §1415(e)(2). 471 US at 374. Thus the ultimate issue of appropriateness and extent of reimbursement must turn on a balancing of all relevant considerations. The I.H.O. held that no reimbursement could be allowed because the placement for which the parents sought it was not appropriate even though, as he also concluded, the District had not offered F.A.P.E. That result leaves the District free of any expenditure for the education of the Child for a two-year period as a result of its own failure to provide him F.A.P.E. The District's only costs in connection with that period, in fact, have been those involved in defending these legal proceedings. Petitioners incurred not only their own fees and costs connected with this proceeding but approximately $50,000 more to obtain educational services for the Child which, although not appropriate within the meaning of EAHCA, nevertheless benefited the child as the I.H.O. found.

The equities do not all favor Petitioners, however. The placement which they chose did not meet the educational standards of its own state and for that reason was not appropriate. Eligibility for EACHA reimbursement was apparently not part of Kildonan's approach. Its spokesperson declared unwillingness to become eligible in its home state and referred to four individual cases, out of approximately 100 students, in which approval was arranged on an "experimental" basis. The effort described by the Mother to find an appropriate placement in Colorado was minimal. Petitioners' own expert witness testified that facilities were available in a neighboring county which could have served the child's needs. The Petitioners did not ask the District either to reimburse the expenses at Kildonan or to find an appropriate placement after the Mother's conversation with Dr. Swize. Just as Kildonan appears to operate without consideration for EACHA funding, the parents apparently did not consider it either. The flat refusal of the District's Director of Special Education to consider changes in the I.E.P. and the District's failure to assure parent awareness in more than a pro forma way were undoubtedly factors in the lack of follow-up. Nevertheless, Petitioners did not seek reimbursement until after all of the Kildonan expense had been incurred. They gave the District no more than minimal opportunity or incentive to seek a less distant and less expensive placement. The District's contention that it was given no opportunity to change the I.E.P. is contrary to the evidence and the I.H.O.'s findings, but the opportunity afforded it was minimal. The District's position that it would not consider changes was unreasonable in view of its own history of failure and defective I.E.P., but the parents' response was extreme and essentially drastic.

B. The Hagin Evaluation

The Act, at 20 USC §1415(b)(1)(A) specifically affords parents the right to obtain an independent educational evaluation of a child. The 1984-86 State Plan, at VI. B(3)(b), states that parents have the right to an independent evaluation at public expense if they disagree with the agency's evaluation, although the agency may initiate a hearing to show that its evaluation was appropriate. The parents did not specifically invoke this provision to request reimbursement for Dr. Hagin's evaluation and thus did not provide the District with an opportunity to seek a hearing to show the appropriateness of its evaluation. Although the I.H.O. did not address that issue specifically, it is apparent from his findings that the Mother knew her rights vaguely at best and that the District failed to advise her of specific rights as well as the reasons for its refusal to change the program. The anticipated procedure of request for reimbursement and opportunity for the District to have the appropriateness issue heard was not followed, but balancing equities clearly favors reimbursement for the cost of the evaluation. The documentary evidence includes a check for $400 written to Dr. Hagin. The parents are entitled to reimbursement of that expense.

C. Placement Costs

The District was obligated to provide F.A.P.E. to the Child and clearly did not do so. That failure was aggravated by an extensive period of time in which the Child consistently performed poorly. His increasing frustration with his school performance contributed at least in substantial part to deteriorating behavior. The District strikingly and consistently failed to find any means by which the Child could compensate for his perceptual disorders and learn at a level approaching comparability to his intelligence. When presented with a new independent evaluation with specific suggestions, the District in effect dug in its heels and refused to budge. Given all these factors, the District's obligation to provide the child F.A.P.E. required placement outside the district in either a specialized public or private day school or residential setting. Had the District met its obligation under the EACHA, it would have incurred the expense necessary to place the child in such an appropriate setting. The parents are not entitled to full reimbursement for an inappropriate placement, but they were entitled to a free appropriate placement. The most reasonable balancing of equities is to require that the District reimburse the Petitioners to the extent of the cost of an appropriate placement. It is appropriate to require the District to pay the costs it was obligated to incur to provide the child with F.A.P.E. Petitioners must bear the additional costs for the inappropriate and substantially more expensive placement which they initiated.

Determining the costs of an appropriate placement must be based upon the following guidelines:

(a) That the facility or program chosen have a proven record of reasonable success in the education of dyslexic children, including those with the Child's type of perceptual or decoding difficulties;

(b) That the facility or program either have most of the features identified as samples of techniques in Dr. Hagin's report or use comparable techniques not repetitive of those already tried unsuccessfully by the District.

(c) That the facility or program have available means and personnel to deal with behavioral disorders such as those manifested by the Child during 1985;

(d) That the facility or program have existed, and have had space available, in the fall of 1985 and have continued to exist and to maintain an appropriate program through the spring of 1987;

(e) That if more than one facility or program meets all of the requirements of (a) - (d) above, the facility or program by which to measure reimbursement costs be determined according to the following priorities:

(1) public facility or program is preferred over private;

(2) a day school or treatment facility or program within a reasonable distance (not more than approximately 50 miles

or one hour's drive one way) of Petitioners' home is preferred over a residential facility;

(3) the nearest facility consistent with other priorities is preferred;

(4) the least costly facility, considering all factors including transportation, is preferred;

(5) absent significant differences in the other priority criteria, the facility or program with the record or reputation as most effective in dealing with the Child's learning disabilities is preferred;

(6) if the emphasis or effectiveness of programs varies as between the child's two disorders, the emphasis or record of effectiveness regarding the learning disability is favored over the behavioral disorder; and

(7) the above stated factors must be considered as a whole or in combination, with no single one controlling over others, e.g., a nearby private day facility may be preferable to a public residential facility depending on other factors;

(f) That the facility or program used be acknowledged as acceptable by Petitioners, or someone designated for that purpose in their behalf, provided that the determination is reasonable, i.e., the expression of acceptability is not unreasonably withheld;

(g) That the facility or program meet the standards of the State of Colorado for Special Education Programs, and either be approved (or have been approved at the time) by the Department or be acknowledged by a person appropriately authorized by the Department to meet Departmental standards;

(h) That the facility or program be within the State of Colorado unless no suitable program or facility exists in this state, in which case the out-of-state program meeting all other criteria which is most appropriate under the priority standards set out in paragraph (e) above, particularly including proximity and cost, should be selected; and

(i) That the amount to be reimbursed include the reasonable costs of any transportation to and from a day facility, the cost of room and board as well as other reimbursable costs of a residential facility and the travel or transportation costs to and from a residential facility at the beginning and end of the school year, during regular vacations and visitation according to the standards of the school no more frequently than once per month.

The A.L.J.'s conclusions on the reimbursement issue involve factual issues which were not presented to the I.H.O. or suggested as potential issues to counsel by the A.L.J. Those questions may, however, be capable either of amicable resolution between the parties or reference to experts. The A.L.J. does not assume at this stage that evidentiary hearing will be necessary, although that possibility cannot be disregarded. The A.L.J. will allow the parties 45 days from the time this decision is issued within which to identify a school or schools meeting the criteria set out in this section, and determine the costs (including educational component of multi-faceted facility) as identified in criterion (i) above which the District would have had to pay to another LEA for placement in a public school facility there. Cost should be determined and stated for each of the school years 1985-86 and 1986-87, not in any event less than the applicable average revenue base for each of the school years in question and not exceeding $10,000 per year unless a higher figure is specifically acknowledged and agreed upon by the District. The parties may designate and refer to experts in the field to review and evaluate schools and programs or may refer the matter to one or more mutually agreeable experts for that purpose. To the extent possible, the parties are encouraged to seek agreement on the identification and costs of the school or schools to be used as a measure for determining reimbursable costs. The A.L.J. will treat any such agreement solely as a stipulation of fact and not as acquiescence in the entry of an order based on the stipulation. This distinction is made to preserve the parties' opportunities for appeal of this decision, or review in the action presenting pending in the Federal District Court for Colorado. If and to the extent the parties are unable to agree on any of those issues, the A.L.J. will resolve them as soon as possible, either by scheduling an evidentiary hearing limited to issues on which oral testimony is necessary, resolving issues on the basis of documentary presentation, or any combination, and issue a supplementary decision resolving the issues and concluding the matter as soon as practicable thereafter.

D. Attorney's Fees

20 USC §1415(e)(4)(B), as amended by the Handicapped Children's Protection Act in 1986, authorizes awards of attorney's fees to prevailing parents. The 1989-91 State Plan, at VII B(9), authorizes such an award in the context of an administrative hearing, although the District argued that authority was limited to Federal courts under the statute. Both provisions clearly leave such an award to the discretion of the presiding officer. The A.L.J. has determined that the District is liable for reimbursement of the cost it would have incurred to provide F.A.P.E. for the child. That determination was based on a balancing of equities when neither the I.E.P. offered by the District nor the alternative selected by the parents was appropriate within the meaning of the EACHA. The result is an award as yet undetermined but almost certain to be less than half of the full reimbursement for Kildonan which the parents sought. In the A.L.J.'s opinion, neither the equities nor a sound exercise of his discretion favor an award of attorney's fees. There were substantial equitable considerations weighing against Petitioners as well as the District. Failure to take any steps to seek reimbursement or attempt to get appropriate placement between the fruitless call to Dr. Swize and the filing of an action in Federal Court after the Child had finished his time in Kildonan was particularly important. The A.L.J. must exercise his discretion reasonably and soundly, and even though an award is permitted is not required. In this case, reason requires applying the normal and traditional principle that litigants each pay their own fees.

DECISION

For the reason stated, the decisions of the I.H.O. that the District's Spring 1985 I.E.P. was procedurally and substantively defective and that the parents are not entitled to reimbursement for the cost of placing the Child at Kildonan school in 1985-87 are affirmed. The decision of the I.H.O. denying any reimbursement to the parents is modified to the extent that the parents shall be entitled to reimbursement for the cost of providing the Child with a free appropriate public education at a facility in Colorado, or as near to Colorado and reasonable in cost as possible if no facility existed in Colorado capable of meeting the Child's education needs. The reviewing Administrative Law Judge retains jurisdiction to make that determination. The parties, through counsel, are allowed 45 days within which to report agreements or continuing disagreements for those matters as set forth in Part VI C of the "Opinion and Conclusions" section of this decision following which the A.L.J. will determine whether or not to hold an evidentiary hearing and enter a final decision at the appropriate time.

DONE AND SIGNED this

26th ____________ of April, 1990

DON P. STIMMEL
Administrative Law Judge

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado to: John G. Neville, 1881 9th Street, Suite 216, Boulder, CO 80203; Gerald A. Caplan and Susan S. Schermerhorn, Attorneys at Law, 2595 Canyon Blvd., Suite 400, Boulder, CO 80302-6703; and via hand-delivery to: Brian McNulty, 201 E. Colfax, Room 300, Denver, CO 80203; on this [illegible] day of [illegible], 1990.

____
Secretary to Administrative Law Judge

FOOTNOTES

1/ This subsection is supplementary to the I.H.O.'s findings based on evidence which is undisputed, clear from the record, or in the nature of an admission by either Kildonan personnel or Petitioners tending to favor an outcome adverse to their interests.

2/ Not subject to specific findings by I.H.O. This section is based upon evidence at the hearing, particularly including testimony of the Petitioners' expert, and documentary and statistical evidence presented to the A.L.J. by the CDE witness in a prior case (T.B. v. Garfield County School District 16, Case No. ED 87-03).

3/ Eagle Hill School. The location is not mentioned in the opinion. The school Dr. Hagin recommended is in Greenwhich, Connecticut. The school may have declined to seek approval because it would have been required to accept emotionally disturbed students. See 873 F.2d at 564, note 1.

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Case Number: SS88:101

Status: State Level Review Supplementary Decision

Key Topics:
Reimbursement
Private Placement
Appropriateness of Placement
Extended School Year (ESY)
Transportation

Issues:

- What amount should parents be reimbursed if standard is to reimburse for cost of what would have been an appropriate private placement.

Decision:

- District reimburse parents the cost it would have had to pay for an appropriate private facility but since it could not access ARB since child was unavailable, burden of loss of ARB is divided among parties.
- Reimbursement rate is 1/2 of the ARB plus excess cost rate plus transportation costs.
- No evidence of need for ESY.

Discussion:

- Balance of equities.
- Proper basis is potential benefit to parents of the district providing FAPE not cost to privately placed student.

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BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. [redacted]

SUPPLEMENTARY AND FINAL DECISION UPON STATE LEVEL REVIEW

[redacted] [redacted], by his parents, [redacted] and [redacted]

Appellants.

v.

BOULDER VALLEY SCHOOL DISTRICT NO. RE-2

Respondent.

This matter was submitted to Don P. Stimmel, Administrative Law Judge ("A.L.J."), State Department of Administration, for review of the decision of David C. Hoskins, Impartial Hearing Officer, under appropriate rules and statutes. After a review of the record and extensive briefing, the A.L.J. issued a Decision Upon State Level Review on April 26, 1990 ("original decision"). That decision included, inter alia, a holding that, based on balancing of the equities, the District would be required to reimburse petitioners to the extent of the cost of an appropriate placement, and allowed the parties time to meet to agree, or provide additional information, concerning such placement and costs. The reports of experts selected by the parties have been received and the A.L.J. has reviewed additional supplemental material, and now issues his decision resolving the cost issues and concluding the matter.

STATEMENT OF ISSUES AND MATERIAL SUBMITTED

The A.L.J. held that the District had failed to provide free appropriate public education ("F.A.P.E.") to the child, but the placement for which the parents have sought reimbursement at Kildonan School in Amenia, New York, was inappropriate and therefore the parents could not be reimbursed for it. The A.L.J. then held that the appropriate test of reimbursement under School Committee of the Town of Burlington v. Department of Education and Massachusetts, 471 U.S. 359 (1985) ("Burlington") involved considering equitable factors and ultimately depended on balancing of all relevant considerations. The A.L.J. discussed those factors and concluded that the District's obligation to provide F.A.P.E. required placement outside the District for which it would have incurred expense. The parents, while not entitled to reimbursement for inappropriate placement, were entitled to an appropriate placement. The A.L.J. then stated that the most reasonable balancing of equities was to require that the District reimburse petitioners to the extent of the costs of the appropriate placement, and set out guidelines for determining that cost. Original decision at 35-37.

The A.L.J. noted that the conclusions on the reimbursement issue, including reimbursement for appropriate placement, raised factual issues on which evidence was not previously presented, but which could be resolved by amicable agreement or reference to experts. Following telephone conferences and correspondence, each party selected an expert to examine available alternatives, seek agreement, and report either jointly or separately to the A.L.J. Since the criteria included acceptability to Petitioners (with a proviso that acceptance not be unreasonably withheld), the A.L.J. permitted the Child's mother to comment on her acceptance or rejection of the reports. The District selected Kathleen Krenzel, Director of Special Education, and Petitioners selected Heidi McClain, who testified as an expert at the hearing before the I.H.O. The experts agreed upon an appropriate placement but disagreed substantially as to the cost. The A.L.J., with advance notice to the parties, contacted Ms. Charmian Palmeno, Supervisor of the Operations and Federal Program Special Education Services Unit in the State Department of Education, for additional information concerning specific costs and sources of funds. This supplementary decision is based upon all that information, including a letter from Ms. Palmeno of which copies were supplied to both counsel.

SUPPLEMENTARY FINDINGS OF FACT

S-1. By agreement of the experts selected by both parties, the day treatment program at Cleo Wallace Center ("Wallace") in northern Jefferson County near Broomfield, Colorado, most nearly met all of the criteria set out in the A.L.J.'s decision and was the most appropriate facility available. It is a private non-profit facility located within 50 miles or one hour's drive of the Child's home.

S-2. Wallace has different rates for placement by school districts and for private placement. For private placement, the cost was $150 per day at all material times. For placement by a school district, Wallace would have received the District's average revenue based ("ARB") through the State Department of Education for the school year plus an excess cost amount from the District of $420.64 per month during 1985-86 and $24.46 per day during 1986-87.

S-3. The state ARB was $332.89 per month in 1985, $349.48 per month in 1986, and $369.11 per month in 1987. That amount is normally paid to each District on the basis of the number of students enrolled, except that the ARB for students enrolled in a District and placed outside the District is paid directly to the District or facility where the student is placed, with the amount credited to the district of residence. The District did not receive any ARB payment for the Child in 1985-86 or 1986-87 because he was neither attending school in the District nor placed elsewhere by the District.

S-4. The State ECEA provides for payment of 80% of excess cost for each District if fully funded. Since it was not fully funded in either 1985-86 or 1986-87, reimbursement was limited to a pro-rata factor expressed as a percentage of the amount the District would have received if ECEA were fully funded. That percentage was 51.156 for 1985-86 and 51.282 for 1986-87.

S-5. Federal EAHCA funds reimbursed each District approximately $220 for the school year for each child in special education in 1985-86, and $222.81 per child in 1986-87.

S-6. Had the Child been placed there in those years, Wallace would have received $6,864.72 from public educational agencies for the Child in 1985-86 and $7,646.27 from those agencies in 1986-87, for a combined amount of $14,510.99. Of those amounts, $3,078.96 in 1985-86 and $3,243.47 in 1986-87 (combined total $6,322.43) would have been paid by the State Department as ARB, and the remaining excess cost, of $3,785.76 for 1985-86 and $4,402.80 for 1986-87 (combined total of $8,188.56) by the District. Of that amount, $2,016.44 for 1985-86 and $2,373.73 (combined total $4,390.17) would have been paid from District funds without reimbursement from ECEA or EAHCA sources.[s-1]

S-7. Ms. Krenzel included estimates of travel cost in her report, based upon the cost of Regional Transportation District ("RTD") bus service. She stated that cost as $.50 per one-way trip for 1985-86 and $1.05 per one-way trip for 1986-87. The report contains no explanation of the discrepancy. Boulder to Broomfield is an "Express" trip. The $1.05 per trip cost listed for 1986-87 was the Express fare throughout.[s-2]

SUPPLEMENTAL DISCUSSION AND CONCLUSIONS OF LAW

As the A.L.J. stated in the original decision, reimbursement here must be based on a balancing of all relevant considerations. The A.L.J. directed that the parties determine the cost which the District would have had to pay another LEA for placement in the public school facility or, if no public facility was appropriate, the cost the District would have had to pay for a private facility. The A.L.J. set out as guidelines that the cost could not in any event be less than the applicable ARB or more than $10,000 per year unless a higher figure was acknowledged and agreed upon by the

District. In setting the guidelines, the A.L.J. regarded the ARB as available to assist the District in paying the cost, being a sum which the District would have received had the Child been placed within it. The supplemental information indicates that the District may not be able to reach the ARB to obtain reimbursement for past school years. Petitioners, however, incurred the full expense of the Child's education from the fall of 1985 to the spring of 1987 without any help from the District, even though the District did not meet its obligation to provide the Child F.A.P.E. The District lost the ARB because the Child was removed, and the Child was removed because the District failed to meet its obligations. The removal deprived both the District and the Petitioners of access to the ARB for the Child's education. The most appropriate balancing is to divide the burden of the loss of ARB between the parties. The A.L.J. has determined that the appropriate level of reimbursement is one-half of the ARB plus the entire excess cost for placement at Wallace for each of the school years involved. The District lost further reimbursment of parts of the excess cost because it was failing to provide an appropriate placement. These costs were clearly related to special education. The District, having the obligation to provide F.A.P.E., must bear the burden of potential loss of reimbursement rather than the Parents, who have already borne the bulk of the cost of educating the Child.

Regarding travel costs, the A.L.J. finds no rational basis for setting the first-year rate for RTD travel below Express fares based on the placement. The appropriate amount is $1.05 per trip for two trips per day, for 180 days, or a total of $378, each year.

Petitioners argue that they should be reimbursed on the basis of the private admission cost at Wallace. The A.L.J. rejects the argument. The basis of reimbursement is the cost to the District and potential benefit to Petitioners of the District providing F.A.P.E. to the Child. The necessary measure of costs must be based upon the premise of placement by the District. Further, Petitioners sought reimbursement for a full calendar year (including summers) for 1985-86. The A.L.J. rejects the argument. Since there was no evidence that the child either needed or received year-round placement for an extended school year at any time, basing any claim for reimbursement on a full year rather than a regular 180-day school year is without foundation.

Based upon the stipulation of the parties concerning the most appropriate placement to have provided the child with F.A.P.E. for the school years involved, according to criteria set out in the Original Decision, the supplemental information concerning costs provided by the Department, and the resolution of issues and balancing of equities set out above, the A.L.J. directs that the District reimburse Petitioners as follows:

(1) Cost of education at Wallace			
1985-86: ½ state average			
ARB ($3,078.96 ÷ 2)	$1,539.48		
Excess cost (9 months @ $420.64)	$3,785.76		
Total for year		$5,325.24	
1986-87: ½ ARB ($3,243.47 ÷ 2)	$1,621.74		
Excess cost ($24.46 x 180)	$4,402.80		
Total for year		$6.024.54	
Combined total			$11,349.78
(2) Cost of transportation			
2 years @ 180 days, @ RTD			
Express rate			
round trip-day (1.05 x 2)	$2.10		
per year ($2.10 x 180)		$378.00	
Total ($378 x 2)			$756.00
(3) Report by Dr. Hagin			$400.00
Combined total			$12,505.78

DECISION

Based on the reasons stated and decision entered in the Original Decision, the decisions of the I.H.O. that the District's spring 1985 IEP was procedurally and substantively defective and that the Petitioners are not entitled to reimbursement for the cost of placing the child at Kildonan School in 1985-87 are affirmed. For the reasons stated in the Original Decision and in this Supplementary Decision, the decision of the I.H.O. denying any reimbursement to Petitioners is reversed and the District is hereby ordered to pay to the parents the sum of $12,505.78 as (1) a share determined by balancing equities of the cost to the District and benefit to the parents which would have been received had the child been offered and provided an appropriate placement meeting the District's obligation to provide F.A.P.E., including transportation, and (2) the cost of obtaining the independent evaluation by Dr.

Rosa Hagin in 1985. Other claims for reimbursement by Petitioners are denied.

DONE AND SIGNED this

10th day of September, 1990

DON P. STIMMEL
Administrative Law Judge

FOOTNOTES

[s-1] Calculation, as stated by Ms. Palmeno:

1985-86		
Excess Cost		$3,785.76
Less ECEA share		
80% Excess cost		
($3,785.76 x 8)	$3,028.61	
x portion funded	.51126	
		1,548.42
less: EAHCA payment		221.00
Balance		$2,016.34
1986-87		
Excess cost		$4,402.80
ECEA 80%	$3,522.24	
XFUND %	.51282	$1,806.26
less: EAHCA		222.81
Balance		$2,373.73

[s-2] Based upon common knowledge of public information, including the A.L.J.'s own experience as a rider on RTD Express routes since the fall of 1985.

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the above **SUPPLEMENTARY AND FINAL DECISION UPON STATE LEVEL REVIEW** by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado to: John G. Neville, 1881 9th Street, Suite 216, Boulder, CO 80203; Gerald A. Caplan and Susan S. Schermerhorn, Attorneys at Law, 2595 Canyon Blvd., Suite 400, Boulder, CO 80302-6703; and via hand-delivery to: Brian McNulty, 201 E. Colfax, Room 300, Denver, CO 80203; on this 10th day of September, 1990.

Peggy Bjorgaard
Secretary to Administrative Law Judge

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Case Number: 88:502

Status: Complaint Findings

Key Topics:
Free Appropriate Public Education (FAPE)
Stay-Put Provision
Due Process
Procedural Safeguards
Compensatory Services

Issues:

- Was FAPE denied student due to inadequate assessments?
- Was FAPE denied due to violation of stay-put provision?
- Was FAPE denied due to a failure to provide services for a period of time?
- Was the parent denied a right to a due process hearing?

Decision:

- District was untimely in assessing student.
- Stay-put provision was not violated by not continuing homebound services as that was not the current educational placement.
- District not at fault in delay of provision of homebound services but must provide compensatory services as identified by staffing team to compensate child for time he did not receive IEP services.
- Compensatory services to be offered because homebound services were not of scope and duration called for on IEP.
- District failed to honor due process hearing request in a timely manner.

Discussion:

- Despite staffing team identifying assessment needs, assessments were delayed.
- Homebound services insufficient to meet needs identified on IEP.
- Parents' due process hearing request was ignored.

PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education on February 22, 1988. The process for receipt, investigation and resolution of the complaint is governed by the Education Division General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Section 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. On April 6, 1988, the complaints officer extended the date for resolution of the complaint from April 22, 1988 to May 27, 1988 for good cause.

2. The complaint was filed on behalf of [redacted] in the interest of her son, [redacted].

3. The complaint named as respondents the following parties: Dr. John Sansone, Director of Special Education for the Pikes Peak Board of Cooperative Educational Services; Dr. Steve McKee, Superintendent of Woodland Park School District Re-2; and Mr. Rob Danin, Principal of Woodland Park Elementary School.

4. It is undisputed that [redacted] is a resident of school age of Woodland Park School District Re-2 ("the district"). The Pikes Peak Board of Cooperative Educational Services ("the BOCES") is the administrative unit for purposes of receiving federal funds. The district and the BOCES are responsible for providing special education and related services to handicapped students within their jurisdictions pursuant to the Education of the Handicapped Act, 20 U.S.C. 1401 et seq.. [redacted] is a handicapped student.

5. The investigation of the complaint included an extensive review of [redacted] education records submitted by the parties, review of the correspondence between the parties' attorneys and lengthy interviews with the parties.

ISSUE #1

STATEMENT OF THE ISSUE:
Whether or not the district and the BOCES have denied [redacted] a free appropriate public education by failing to adequately assess him.

RELEVANT STATUTORY AND REGULATORY CITATIONS:
20 U.S.C. 1401(18), 1401(19), 1412(1), 1412(2)(B),1412(5)(C) and 34 C.F.R. 300.4, 300.121, 300.133, 300.220, 300.240, 300.300, 300.500, 300.531, 300.532, 300.533, and 300.541-300.543. State Plan under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142, Section VB.3.b.i.

FINDINGS

1. On [redacted] IEP dated November 24, 1987, the staffing committee identified that [redacted] needed an educational assessment, an outreach assessment and an adaptive physical education assessment.

2. The adaptive P.E. assessment was done on December 1, 1987. Attempts to conduct an outreach assessment were unsuccessful on December 7, 1987. No further attempts were made. Several components of an educational assessment were performed on December 3, 1987 and during November 1987.

3. The IEP dated December 7, 1987 contains no notations in the section concerning adequate assessments. It calls for an adaptive P.E. assessment which apparently had been concluded. Additionally, the narrative section contains a notation that the staffing team believed there to be a need to complete assessments.

4. The IEP which resulted after a third staffing team meeting on February 8, 1988 indicated that there had yet to be an adequate educational assessment of [redacted] and such an assessment was needed. It stated that another adaptive P.E. assessment was needed.

5. An adaptive P.E. assessment was done on February 19, 1988 and educational assessments performed on February 24, 1988.

6. At best, a three month time period elapsed during which the staffing team itself continued to identify a need for [redacted] to receive an educational assessment. An adequate educational assessment was not done in a timely manner.

7. By stipulation of the parties, [redacted] underwent an intensive multi-faceted evaluation at the John F. Kennedy Child Development Center ("JFK Center") on April 14, and 15, 1988.

RECOMMENDED COMPLIANCE ACTIONS

1. The district and BOCES will provide written assurance to the complaints officer within thirty days that it will further assess [redacted] if the JFK Center recommends further assessment. The assurance will provide the following information: the type of assessment to be performed; the scheduled date of the assessment; the district or BOCES staff member responsible for completing the assessment or contracting with a third party for conducting the assessment; and the date on which the results of the assessment will be available. It is recommended that the date of availability of any additional assessment report be no later than 45 days after the date of receipt of this document.

ISSUE #2

STATEMENT OF THE ISSUE:
Whether or not the district and the BOCES have denied [redacted] a free appropriate public education by failing to maintain his current educational placement pending the outcome of the requested due process hearing.

RELEVANT STATUTORY AND REGULATORY CITATIONS
20 U.S.C. 1401(18), 1412(1), 1412(2)(B), and 1415(e)(3) 34 C.F.R. 300.4, 300.121, 300.131, 300.237, 300.300, and 300.513. State Plan, supra. Section VI B.8.d.

FINDINGS

1. The Staffing Summary and Educational Plan (IEP) dated November 24, 1987 resulted in [redacted] continuing to be placed in the Woodland Park Elementary School and receiving his academic classes in the resource room or self-contained classroom. The district, BOCES and mother agreed with this placement.

2. The IEP dated December 7, 1987 notes that Myron Stratton and the NEED program were the only placements considered at that time. The staffing committee recommended a day treatment program. [redacted] did not agree with the recommended placement as evidenced on page 5 of the IEP.

3. [redacted] filed a request for a due process hearing because she wanted to have [redacted] served in the district. It was received by the BOCES on December 10, 1987.

4. The district and the BOCES contend that when it became apparent at the staffing meeting that [redacted] would not agree to a placement out of the elementary school, the parties reached a compromise. The compromise position was that [redacted] would be served by homebound instruction. [redacted] contends she did not agree to homebound instruction as a placement for [redacted] but merely accepted homebound services because the district and BOCES refused to allow [redacted] to come to school.

5. There is no written documentation to establish that homebound instruction was a placement agreed upon by all parties. Therefore, the placement outlined in the first IEP of November 24, 1987 is the current educational placement while the appeal was pending, in accordance with the statutory and regulatory authority cited above.

RECOMMENDED COMPLIANCE ACTIONS

1. Realizing this option is impractical at best with only a few days remaining in this school year, [redacted] has the option of returning [redacted] to his placement at Woodland Park Elementary School for the duration of this school year. Such placement is his current placement for the next school year as well, if nothing is resolved by the parties prior to that time.

ISSUE #3

STATEMENT OF THE ISSUE:

Whether or not the district and the BOCES have denied [redacted] a free appropriate public education by failing to provide him with any educational services for a period of time.

RELEVANT STATUTORY AND REGULATORY CITATIONS:

20 U.S.C. 1401 (18), 1401(19), 1412 (1), and 1412 (2)(B), 34 C.F.R. 300.4, 300.121, 300.235, 300.300, 300.342, 300.343(c), and 300.346. State Plan _supra._ Section V.

FINDINGS:

1. [redacted] ran away from school on December 1, 1987.

2. [redacted] received no educational services from December 1, 1987 to January 27, 1988.

3. During the above-stated time period, the school district had a two-week vacation.

4. [redacted] missed approximately six weeks of education and related services to which he was entitled.

5. Commencing on January 27, 1988, [redacted] was provided with one hour per day of home bound instruction.

6. Subsequent to that time, the homebound services offered to [redacted] were increased to two hours per day. No evidence was available on whether or not these services were adequate to meet [redacted] needs.

7. The district did undertake to find a homebound instructor for [redacted] within a reasonable amount of time after the staffing of December 7, 1987. The district staff's efforts were made in good faith but were hampered by circumstances beyond their control.

RECOMMENDED COMPLIANCE ACTIONS

1. The district will offer [redacted] additional services to compensate him for the period of time he received no services at all. The nature and scope of the services, and how these services will be integrated with [redacted] future program services as well as their duration, are issues that should be discussed at the staffing meeting to be scheduled following release of the JFK Center evaluation reports.

2. The staffing committee will discuss whether or not the services being offered to [redacted] in homebound instruction were of sufficient scope and duration to meet his needs, as identified on his IEP. If not sufficient, the committee will discuss and recommend the nature and scope of services to be offered to [redacted] to compensate for the insufficiency of services offered to him by the homebound instruction and how these services will be integrated with [redacted] future program services.

ISSUE #4

STATEMENT OF THE ISSUE:
Whether or not the district and the BOCES violated the Education of the Handicapped Act, 20 U.S.C. 1401 et seq. and its implementing regulations by failing to provide [redacted] a due process hearing.

RELEVANT STATUTORY AND REGULATORY CITATIONS:
20 U.S.C. 1412(5), 1415(a), 1415(b)(1)(E), 1415(b)(2), and 1415((d) 34 C.F.R 300.403(b), 300.506, 300.508, and 300.512. State Plan supra. Section VI.B.8.

FINDINGS:

1. [redacted] made a written request for a due process hearing because she wanted [redacted] served in the district and the placements recommended by the staffing committee at the meeting on December 7, 1987 were not placements in the elementary school.

2. The BOCES received the request for a hearing on December 10, 1987.

3. The statutory timeline for a hearing to be held and a decision to be rendered expired on Monday, January 25, 1988.

4. There is no evidence that the district or BOCES selected an impartial hearing officer to conduct the hearing or took any other steps whatsoever to respond to [redacted] request.

5. There is no documentation that the 45 day time period was waived or extended.

6. The procedural rights. guaranteed [redacted] by the above-referenced statutes and regulations were violated.

7. Several weeks subsequent to the expiration of the 45 day time limit, [redacted], through counsel, agreed to postpone a due process hearing in exchange for the district's agreement to a complete outside evaluation of [redacted]. The district so agreed. However, these later actions do not mitigate the BOCES's and district's failure to honor the request for the due process hearing in a timely manner.

RECOMMENDED COMPLIANCE ACTIONS

1. The district and BOCES will submit copies of their procedural safeguards policy to the complaints officer within thirty days of receipt of this document. The complaints officer will review it to determine whether or not it complies with the above-referenced statutes and regulations. Any legal deficiencies identified in the policy will be remedied as soon as possible.

2. If a new State Plan Under Part B of the Education of the Handicapped Act As Amended by P.L. 94-142 is adopted by the State Board of Education at its June Board Meeting and by its terms it would require the district and BOCES to amend their procedural safeguards policy, the new policy will be submitted to the complaints officer on or before September 1, 1988. The complaints officer will review the policy for compliance with the above-referenced statutes and regulations. Any legal deficiencies identified in the policy will be remedied as soon as possible.

3. On or before September 1, 1988, the BOCES will submit a plan to provide inservice training to the district administrators of its member districts on the implementation of the procedural safeguards policy. Such training should take place during the first quarter of the 1988-89 school year. The Colorado Department of Education is available to provide technical assistance upon request.

ADDITIONAL MATTERS

1. The complainant has requested that she be awarded attorneys fees. The complaints officer does not have authority to award attorney fees. Therefore, the request is denied.

2. Because of the complex nature of the ongoing disputes between the parties, the Colorado Department of Education, Special Education Services Unit will provide a senior consultant to facilitate the staffing which will be scheduled for [redacted] following receipt of the reports from the JFK Center.

Dated this 23rd day of May, 1988.

By: Cheryl M Karstaedt

Cheryl M. Karstaedt
Federal Complaints Officer
Office of Federal Relations
Colorado Department of Education
201 E. Colfax, Room 401
Denver, CO 80203
866-6759

Case Number: 88:505

Status: Complaint Findings

Key Topics: Communicable diseases
Exclusion
Procedural Safeguards
Notice
Due Process
Stay-Put Provision
Change of Placement

Issues:

- Was child excluded from school on basis of handicap in violation of law?

- Whether or not the parents' and student's rights to procedural safeguards were violated when the child was excluded from school.

- Whether FAPE was denied because district staffing committee was not allowed to consider placement in LRE (Least Restrictive Environment).

- Whether FAPE was denied when district did not allow child to return to school pending outcome of due process hearing.

Decision:

- Student was not discriminated against on basis of handicap.

- Excluding the child from school constituted a change of placement and was impermissible without prior notice to parents and invoking other procedural safeguards.

- District failed to honor parents' request for a due process hearing.

- LRE issue was resolved in a due process proceeding and therefore not to be decided in collateral complaint proceeding.

- FAPE was denied when child was not permitted to return to the classroom pending outcome of due process hearing.

Discussion:

- District's communicable disease policy did not contain provisions for applying it to handicapped students.

Case Number: 88:505
Cont'd

- Child had Hepatitis B and was sent home from school pending a medical review.
- Parents were non-English speaking and notices were not appropriately communicated in their oral language.
- Handicapped students may not be unilaterally excluded from school.

Federal Complaint Numbers [redacted] 88:505
Findings and Recommendations

Preliminary Matters

1. The complaint was received by the Federal Complaints Officer on April 25, 1988. The amended complaint was received on May 23, 1988. The process for receipt, investigation, and resolution of the complaint, as amended, is governed by the Education Division General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Sections 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. On May 26, 1988, the complaint as amended was accepted for investigation and July 8, 1988 was established as the date on or before which all issues in the complaint and amended complaint would be resolved.

2. The complaint was filed by Ms. M. Claire Williamson, Senior Attorney, The Legal Center on behalf of [redacted] and [redacted] in the interest of their son, [redacted] ([redacted]) [redacted].

3. The complaint named as respondents the following parties: Dr. Michael Massarotti, Superintendent, Adams County School District #50, and Dr. Art Pliner, Director of Special Services, Adams County School District #50.

4. The investigation of the complaint included a review of [redacted] educational records as submitted by the parties, of the position statements of the parties and of the correspondence exchanged by the parties, as well as several telephone conversations with Ms. Williamson and Dr. Pliner.

Undisputed Facts

1. [redacted] is a resident of school age of Adams County School District #50 ("the district"). The district is responsible for providing special education and related services to handicapped students within its jurisdiction pursuant to the Education of the Handicapped Act, 20 U.S.C. 1400 et seq. The district is the recipient of federal funds for this purpose. [redacted] is a handicapped student with contagious Hepatitis B.

2. Pursuant to an Individual Education Program developed for [redacted] at a review staffing held on May 27, 1987, he was to receive special education and related services in a self-contained special kindergarten class at Roush Elementary School during the 1987-1988 school year.

3. On January 4, 1988, Dr. Massarotti sent a letter to [redacted] parents informing them that the district's physician had requested from the parents' physician certain information about [redacted] medical condition and the information had not been provided. Further, the letter stated that [redacted] was being excluded from school until the district received the medical information and conducted a medical review.

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4. [redacted] was excluded from school and received no educational services for a period of time. He then began receiving educational services four afternoons per week for one and one-quarter hours per day in an alternative school program.

5. On April 18, 1988 the Legal Center requested that the district hold a due process hearing on the issue of [redacted] educational placement.

6. A staffing was held on May 18, 1988 to discuss the results of the district's medical review and to develop an IEP for [redacted]. At that time, it was the opinion of the district's physician that [redacted] was too high a risk to other students and staff because of his contagious Hepatitis B to allow him to attend the special kindergarten program.

7. On May 31, 1988, [redacted] returned to the special kindergarten program he had attended prior to January 1988.

8. On June 13, 1988, The Legal Center withdrew the request for a due process hearing which it had filed on behalf of [redacted] parents.

Issue #1

Statement of the Issue:

Whether or not the district discriminated against [redacted] solely on the basis of his handicap when it excluded him from participation in the kindergarten program at Rousch Elementary School.

Relevant Statutory and Regulatory Citations

29 U.S.C. 794
34 C.F.R. 104.3, 104.4(a), 104.33 - 104.37

Findings:

1. [redacted] is a qualified handicapped person within the meaning of the above-referenced citations.

2. [redacted] was excluded from school on the basis of the application of the district's "Communicable Diseases - Students" policy.

3. The district policy is applicable to all students and is based on the requirements of Sections 22-33-106(2) and 22-32-109(1)(w), C.R.S.(1987 Supp.).

4. The district has no written policy or procedure to set forth the appropriate steps for implementation of the "Communicable Diseases-Students" policy to its handicapped students.

5. [redacted] was excluded from school pending a medical review because he was diagnosed as having Hepatitis B.

6. [redacted] was not discriminated against on the basis of his handicap when he was excluded from school.

Recommended Compliance Actions:

1. It is recommended that the district establish procedures to deal with situations which may arise in the future concerning the application of the "Communicable Diseases - Students" policy to handicapped students. These procedures would recognize the need to coordinate the requirements of the School Attendance Law, Section 22-33-101 et seq. C.R.S. (1987 Supp.) with the requirement to convene a staffing committee meeting and to provide the student and parents with the procedural safeguards guaranteed by Federal statute. The district will submit such a policy on or before December 15, 1988, to the complaints officer who will review it for legal compliance with federal law.

Issue #2

Statement of the Issue:

Whether or not the district's policy "Communicable Diseases-Students" violates either section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 or the Education of the Handicapped Act, 20 U.S.C. 1400 et seq. when applied to handicapped children.

Relevant Statutory and Regulatory Citations:

29 U.S.C. 794, 20 U.S.C 1400 et seq.,
34 C.F.R 104.3 - 104.4(a), 34 C.F.R. 104.33 - 104.37, 34 C.F.R. Part 300.

Findings:

1. See Findings below in the discussion of Issue #3.

2. When the policy is applied without provision of the procedural safeguards guaranteed by federal law, the policy is not in compliance with federal requirements for providing special education and related services to handicapped students.

Recommended Compliance Actions:

1. See Issue #1.

Issue #3

Statement of the Issue:

Whether or not the parents of [redacted] were offered the necessary procedural safeguards by the district when [redacted] was removed from the kindergarten program.

Relevant Statutory and Regulatory Citations:

20 U.S.C. 1415(b)(1)(C), 20 U.S.C. 1415(b)(1)(D), 20 U.S.C. 1415(b)(1)(E), and 20 U.S.C. 1415 (e)(3).
34 C.F.R. 300.237, 34 C.F.R. 504(a)(1), 34 C.F.R. 505(a), (b) and (c), and 34 C.F.R. 300.513.
State Plan Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142, Sections VI.B.1., VI.B.8.d.

Findings:

1. On January 4, 1988, Dr. Massarotti sent a letter to [redacted]. [redacted] informing them, in part, that "until you cause Dr. Chan to release the medical information required by Dr. Engel in his medical review of [redacted] case, I am excluding [redacted] from School District No. 50 Schools effective immediately and until such time that the District completes the medical review."

2. [redacted] was excluded from the district's schools for a period of time beginning on January 11, 1988. He began receiving services in an after school program on March 16, 1988.

3. Prior to the letter being sent, several district representatives had been in contact with the [redacted] in an attempt to obtain information regarding [redacted] medical condition and to explain the need for a medical review by the district.

4. The [redacted] family's native language is [redacted]. [redacted] has limited English speaking ability. [redacted] does not speak English.

5. Federal statute and regulation require that a district notify the parents of a handicapped child when it proposes to change the child's placement.

6. According to the United States Supreme Court, excluding a handicapped child from school constitutes a change of placement and invokes the federally mandated procedural safeguards. See Honig v. Doe, 108 S.Ct. 592 (1988).

7. The notice given by the district to the parents regarding the proposed change in placement did not conform to the requirements of the above-referenced statutes and regulations in that the notice was not relayed to them in their native language. There is no written evidence that it was translated orally so that they understood the contents of the notice, Hmong being primarily an oral language.

8. Additionally, they were not informed of their rights to appeal a change of placement recommendation and to have [redacted] maintained in his current placement pending such appeal.

9. Further, even though the district believed in good faith that [redacted] posed a danger to the health of other students and staff, the Supreme Court has stated that handicapped children may not be unilaterally excluded from school for periods exceeding suspensions of up to ten days without the permission of the parents or the courts, and without invoking the requisite procedural safeguards.

10. The district was admittedly faced with a serious medical and ethical dilemma occurring at precisely the time the *Honig* decision was issued. While that case is factually distinguishable, the court's reliance on the procedural aspects of the Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.*, is instructive.

11. The federal law requires the district to hold a staffing prior to changing the educational services or placement offered to a handicapped student. Since the parents did not agree to [redacted] being excluded from school nor with the limited amount of services offered to [redacted] after school hours and the district did not want to maintain [redacted] in the current educational placement at Roush Elementary School's special kindergarten program pending the outcome of the district's medical review, the district could have sought a court order to deal with the issue.

12. The Supreme Court found Section 1415(e)(3) to be unequivocal in its mandate that a handicapped child *shall* remain in the then current educational placement. It held that the statute demonstrates a congressional intent to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. The Supreme Court specifically refused to rewrite the statute to infer a "dangerousness" exception on the basis of obviousness or congressional inadvertence, since, in drafting the statute, Congress devoted close attention to *Mills* v. *Bd. of Ed. of Dist. of Columbia*, 348 F.Supp.866, and *Pennsylvania Association for Retarded Children* v. *Pennsylvania*, 334 F.Supp 1257,and 343 F.Supp.279, thereby establishing that the omission of an emergency exception for dangerous students was intentional.

However, the Court found that Congress did not leave school administrators powerless to deal with such students, since implementing regulations allow the use of normal, non-placement changing procedures, including temporary suspensions for up to 10 school days for students posing an immediate threat to others' safety. The Act also allows for interim placements where parents and school officials are able to agree and authorizes officials to file a Section 1415(e)(2) suit for "appropriate injunctive relief" where such an agreement cannot be reached. In such a suit, Section 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can rebut only by showing that maintaining the current placement is substantially likely to result in injury to the students or to others.

13. In summary, the exclusion of [redacted] constituted a change of placement. The placement change was implemented without a staffing. The notice to the parents regarding the change was insufficient. The parents were not informed of their procedural rights in connection with the district's recommended change. The district did not follow an appropriate process to exclude [redacted] from school.

Recommended Compliance Actions:

1. That the district submit a written assurance to the complaints officer on or before September 15, 1988, that in all instances when there is a handicapped student in the district whose parents' native language is other than English, the parents will be given the notice required by 20 U.S.C. 1415(b)(1) and 34 C.F.R. 300.504 in their native language or mode of communication in a manner to insure the parents' understanding.

2. That the district submit a written assurance to the complaints officer on or before September 15, 1988, that all further notices concerning [redacted] educational placement as required by statute and regulation which are sent to the [redacted] family be communicated orally to them in Hmong and that there is written evidence of such oral communication, as required by regulation.

3. That [redacted] be offered services according to his IEP to compensate him for the period of time he was excluded from his placement in the special kindergarten class at Rousch Elementary School. The nature and scope of the services, how these services will be integrated with [redacted] future program services, and the duration of the services are issues that should be discussed at [redacted] next review staffing. It is the complaints officer's understanding that [redacted] received services after school for a period of weeks prior to returning to his classroom. Further, he is receiving services according to his IEP for 10 hours per week during the summer. The staffing committee will discuss whether or not the services received by [redacted] after school were

of sufficient scope and duration to meet his needs, as identified on his IEP. If not sufficient, the committee will discuss and recommend the nature and scope of services to be offered to [redacted] to compensate for the lack of services for a period of time and for the insufficiency of services offered in the afternoon program. The committee will then determine if the services offered this summer sufficiently compensate [redacted]. If they do not, the committee will recommend services in addition to [redacted] school year program or services during the summer of 1989 to meet [redacted] needs as identified by the staffing committee.

Issue #4

Statement of the Issue:

Whether or not the district has violated the Education of the Handicapped Act, 20 U.S.C. 1400 et seq., more specifically, 20 U.S.C. 1415, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, the implementing regulations and the State Plan by failing to provide the parents of [redacted] due process hearing as requested.

Relevant Statutory and Regulatory Citations:

20 U.S.C. 1412(5), 20 U.S.C. 1415(a), 20 U.S.C. 1415(b)(1)(E), 20 U.S.C. 1415(b)(2) and 20 U.S.C. 1415(d), 29 U.S.C. 794,
34 C.F.R. 300.237, 34 C.F.R. 300.403(b), 34 C.F.R. 300.506, 34 C.F.R. 300.508, and 34 C.F.R. 300.512, 34 C.F.R. 104.36.
State Plan supra, Section VI.B.8.

Findings:

1. On April 18, 1988, The Legal Center made a written request to the district on behalf of [redacted] for a due process hearing on the issue of [redacted] educational placement.

2. The timeline for a hearing to be held and a decision to be rendered is 45 days after receipt of the request by the district.

3. Assuming receipt of the request by the district on April 19 (the date of receipt of the federal complaint also dated and mailed April 18, 1988), the timeline for the hearing to be held and a decision rendered expired on Friday June 3, 1988.

4. The procedures for implementing a due process hearing request are set out in the above-referenced citations. The State Plan, Section VI B.8.a.i. states that "within ten school days" after the request is received, the parties are to be notified as to who shall conduct the hearing. The district is to select the hearing officer.

5. The district did not select a hearing officer in a timely fashion although it did contact the Colorado Department of Education for a list of potential hearing officers after it completed its medical review.

6. On May 27, 1988, a representative of the parents informed the district that it was not necessary to appoint a hearing officer as the matters to be addressed in such a hearing were in the process of being resolved.

7. There is no documentation prior to that time that the 45 day time period was waived or extended.

8. Even assuming the hearing could have been held and written findings issued on the last possible date, the ten day timeline for mailing the notice of the hearing rights had expired (State Plan, Section VI B.8.a.ii.).

9. The district failed to respond to the parents' request for a due process hearing in a timely fashion.

Recommended Compliance Actions:

1. On or before September 15, 1988, the district will submit a copy of its procedural safeguards policy to the complaints officer. The complaints officer will review the policy to determine whether or not it complies with the above-referenced statutes and regulations as well as the new State Plan under Part B of the Education of the Handicapped Act As Amended by P.L. 94-142 adopted by the State Board of Education on June 9, 1988. Any legal deficiencies identified in the policy will be remedied as soon as possible.

2. On or before September 15, 1988, the district will submit written assurances to the complaints officer that district administrators, teachers, and staff who are responsible for implementing the procedural safeguards policy have received copies of the policy and instructions on its implementation.

Issue #5

Statement of the Issue:

Whether the district has denied [redacted] a free appropriate public education in violation of the Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 by prohibiting the staffing committee from considering placement in the least restrictive environment when formulating an educational program for [redacted] on May 18, 1988.

Relevant Statutory and Regulatory Citations:

20 U.S.C. 1401(18), 20 U.S.C. 1412(1), 20 U.S.C. 1412(2)(B), 20 U.S.C. 1412(5)(B), 20 U.S.C. 1414(a)(1)(c)(iv), and 29 U.S.C. 794.
34 C.F.R. 300.4, 34 C.F.R. 300.121, 34 C.F.R. 300.132, 34 C.F.R. 300.300, 34 C.F.R. 300.305, 34 C.F.R. 300.306, 34 C.F.R. 300.533, 34 C.F.R. 300.550 - 300.556, 34 C.F.R. 104.33 - 104.34
State Plan supra, Section VII.B.

Findings:

1. After the district medical review was completed, a staffing was held on May 18, 1988 to review [redacted] educational program.

2. Complainants allege that at the onset of the staffing, the staffing committee members were informed that the services they were to recommend for [redacted] had to be offered in the context of the district's physician's recommendations that [redacted] would not be allowed "around non-immunized professional personnel or any students to whom he may represent a health danger."

3. The opinion of the district's physician is an appropriate piece of information to be considered by the staffing committee.

4. The decision of the staffing committee was that [redacted] receive services in an environment that conformed with the recommendation of the districts's physician.

5. The parents continued to pursue their due process hearing rights on the issue of [redacted] educational program subsequent to the May 18, 1988 staffing.

6. The parties have resolved the matters at issue in the due process procedure.

Recommended Compliance Actions:

1. Since the parties have resolved the issues between them concerning [redacted] educational program, including program services being offered in the least restrictive environment, the complaints officer declines to recommend any compliance actions in this regard. However, in accordance with the recently adopted State Plan, the district will be submitting a Comprehensive Program Plan to the Colorado Department of Education during the upcoming school year that will deal in detail with the issue of least restrictive environment.

That plan will be reviewed by CDE staff for compliance with the above-cited statutory and regulatory provisions to ensure the concept of LRE is being implemented in the district, that district personnel have knowledge of and correctly apply the concept and that staffing committee members understand and carry out their roles in recommending placements for handicapped children in the least restrictive environment.

Issue #6

Statement of the Issue:

Whether the district has denied [redacted] a free appropriate public education in violation of the Education of the Handicapped Act, 20 U.S.C. 1400 et seq., by failing to return [redacted] to his educational program pending the outcome of the parents' requested due process hearing.

Relevant Statutory and Regulatory Citations:

20 U.S.C. 1401(18), 20 U.S.C. 1412(1), 20 U.S.C. 1412(2)(B), and 20 U.S.C. 1415(e)(3).
34 C.F.R. 300.4, 34 C.F.R. 300.121, 34 C.F.R. 300.237, 34 C.F.R. 300.300, and 34 C.F.R. 300.513.
State Plan supra, Section VI.B.8.d.

Findings:

1. [redacted] was placed in a special kindergarten class at Rousch Elementary School to receive the services outlined in the IEP developed for him in May, 1987.

2. [redacted] was excluded or suspended from this placement on January 11, 1988 based on the district's good faith belief that [redacted] posed a health risk to his fellow students and the staff of the district.

3. No staffing committee meeting was convened to discuss [redacted] educational needs and placement until May 18, 1988.

4. The district began offering an educational program to [redacted] after the "normal" school day had concluded on March 16, 1988.

5. Excluding [redacted] from his special kindergarten class at Rousch Elementary School constituted a change of placement. (See Issue #3)

6. [redacted] parents disagreed with this change of placement, although a request for a due process hearing was not sent to the district until April 18, 1988.

7. The last agreed upon placement and the placement in which [redacted] was entitled to remain pending resolution of the placement issue in a due process hearing, parental agreement with a change or an injunction obtained from a court by the school district, is the special kindergarten class at Rousch Elementary School.

Recommended Compliance Actions:

1. Based upon the understanding that [redacted] returned to his current placement at Rousch Elementary School on May 31, 1988, the complaints officer is not recommending any additional compliance actions by the district. However, the district's procedural safeguards policy to be submitted in connection with Issue #4 will be reviewed for compliance with the requirements of the statutes and regulations regarding a child's status during the pendency of administrative or judicial proceedings.

Case Number: 88:507

Status: Complaint Findings

Key Topics: Free Appropriate Public Education (FAPE)

Issues:

- Whether FAPE was being denied by the school district.

Decision:

- No denial of FAPE.

Discussion:

- Parent did not respond to request for additional information during investigation.
- Student was placed in resource room and regular education classes in school of parent's choice.

Federal Complaint Number [redacted] 88-507
FINDINGS AND RECOMMENDATIONS

PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education, on May 9, 1988. It was forwarded by Dr. G. Thomas Bellamy, Director, Office of Special Education Programs, United States Department of Education after having been sent by the complainant to Mr. James Greene of OSEP.

2. The process for receipt, investigation and resolution of the complaint is governed by the Education Division General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0.

3. The complaint was filed by [redacted] in the interest of her daughter, [redacted].

4. The complaints officer determined that the appropriate respondents to the complaint are the following: Mr. Steven M. Jones, Executive Director, Mountain Board of Cooperative Education Services, Mr. Lennard Eckhardt, Superintendent, Garfield School District Re-2, and Mr. John Burwell, Principal, Rifle High School.

5. It is undisputed that [redacted] is a resident of school age of Garfield School District Re-2 ("the district"). The Mountain Board of Cooperative Education Services ("the BOCES") is the administrative unit for the purpose of receiving federal funds for special education. The district and the BOCES are responsible for providing special education and related services to handicapped students within their jurisdictions pursuant to the Education of the Handicapped Act, 20 U.S.C. 1400 et seq. ("the Act"). [redacted] is a handicapped student.

6. The investigation of the complaint included a review of the complaint, the response and other relevant documents and several conversations with Mr. Jones, as the representative of the respondents. Despite several requests to do so, [redacted]. [redacted] declined to provide the additional information requested by the complaints officer to assist in the investigation.

STATEMENT OF THE ISSUE

Whether or not [redacted] is being denied her right to a free appropriate public education in violation of the Act by the failure of the BOCES and the district to enroll her in Rifle High School and develop an Individual Education Program for her.

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RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(18) and (19), 20 U.S.C. 1412(1) and (2)(B).
34 C.F.R. 300.4, 300.121, 300.130, 300.220-240, 300.300, 300.340-346, 300.349.
State Plan Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142, Section V.

FINDINGS

1. [redacted] attempted to enroll [redacted] in Rifle High School in Garfield School District Re-2 on March 21, 1988.

2. The BOCES operates a secondary severe needs program for its member districts at Glenwood Springs High School in Glenwood Springs. The program provides education and related services in an age appropriate setting to meet the needs of handicapped students with a variety of handicapping conditions and an array of individual special needs.

3. Based upon the limited information available at the time of enrollment regarding [redacted] needs, it was recommended that [redacted] visit the program at Glenwood Springs. District personnel believed that program to be most similar to the program offered to [redacted] in Missouri, prior to the family's move to Colorado.

4. A staffing was scheduled for [redacted] for April 5, 1988.

5. [redacted] visited the Glenwood Springs program on March 23, 1988, and decided it would not be appropriate for [redacted].

6. Rifle High School was on spring break from March 26 until April 4, 1988.

7. On April 6, 1988, [redacted] was staffed and placed in the Rifle High School resource room and regular education program in accordance with [redacted] wishes.

8. A review staffing was scheduled prior to the end of the year to review [redacted] placement.

9. There are no facts to support a finding that the district or BOCES has violated federal law by failing to offer [redacted] a free appropriate public education according to an IEP.

RECOMMENDED COMPLIANCE ACTIONS

None

Case Number: 88:508

Status: Complaint Findings

Key Topics: Graduation
Procedural Safeguards
Free Appropriate Public Education (FAPE)

Issues:

- Whether the decision by the district to graduate the student denied him a FAPE.

Decision:

- Student was appropriately graduated.

- Handicapped student may be graduated after satisfactory completion of an IEP reasonably calculated to enable the student to receive educational benefits if the IEP was developed in accordance with EHA (Education of the Handicapped Act) procedures.

Discussion:

- Document reflected notice to parent that student was on target for graduation.

- Student entitled to credits earned for graduation.

- District had appropriate policies regarding earning of graduation credit.

- Both accomplishment of IEP goals and credits earned were considered in making decision to graduate student.

FEDERAL COMPLAINT NUMBER [redacted] 88.508
FINDINGS AND RECOMMENDATIONS

Preliminary Matters

1. The complaint was received by the Federal Complaints Officer on June 23, 1988. The process for receipt, investigation, and resolution of the complaint is governed by the Education Division General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Sections 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. On June 29, 1988, the complaint was accepted and August 22, 1988 was set as the date on or before which the complaint was to be resolved.

2. The complaint was filed by Ms. Peg Long, Senior Attorney, The Legal Center on behalf of [redacted] for her son, [redacted], and The Legal Center as the Protection and Advocacy Agency in Colorado.

3. The complaint named as respondents the following parties: Dr. Kenneth S. Burnley, Superintendent, El Paso County School District No. 11, and Dr. Marilyn Jaitly, Acting Director of Special Education, El Paso County School District No. 11.

4. The investigation of the complaint included an extensive review of [redacted] education records as submitted by the parties, consideration of the position statements of the parties and several telephone conversations with the parties and/or their representatives.

5. On July 7, 1988, [redacted] representative submitted a cover letter and additional documents to the complaints officer to assist in the investigation of the complaint. To the extent that the information supplemented the issue raised by the complaint, it was considered. To the extent that the letter raised issues concerning the validity of the individual education plans offered to [redacted] during 1986-1987 and 1987-1988, and the change in his handicapping condition from SLIC to P/C in 1986, the information was not considered. The complaint filed on July 21, 1988 contains allegations relating solely to the issue of [redacted] graduation. Subsequent correspondence may not serve as a basis for the complaints officer to expand the investigation to include additional issues based on fact patterns not alleged within the scope of the complaint. The issue accepted for investigation and of which the respondent was notified related to the denial of a free appropriate public education to [redacted] based upon the decision by the district to graduate him. The issue as alleged in the complaint and accepted for investigation was not whether [redacted] was denied a free

appropriate public education by the district's failure to develop appropriate IEPs for 1986-1987 and 1987-1988 or by the district's changing of his handicapping condition in 1986.

Additionally, the change in [redacted] handicapping condition occurred two school years ago and was approved by [redacted] at the time. Even if the issue had been raised in the complaint, it would have been untimely pursuant to paragraph 5 of Policy No. 1280.0.

Further, even if the issue of the appropriateness of the IEP from 1986-1987 had been properly raised, no documentation has been submitted to support the allegation. [redacted] approved the document as is evidenced by her signature thereon, she did not question its validity during the duration of its operation and to raise such an issue now would be untimely pursuant to paragraph 5 of Policy No. 1280.0

UNDISPUTED FACTS

1. [redacted] is a nineteen year old young man who resides within the geographic boundaries served by El Paso County School District No. 11, ("the district"). The district is responsible for providing special education and related services to handicapped students within its jurisdiction pursuant to the Education of the Handicapped Act, 20 U.S.C. 1400 et seq. ("the Act"). The district is the recipient of federal funds for this purpose.

2. From approximately 1978 until June of 1988, [redacted] received special education and related services as a handicapped child residing in the district under the terms of the Act.

3. In June of 1988, the district graduated [redacted] The district has informed [redacted] that it will not offer education and related services to [redacted] during the upcoming school year.

4. Prior to graduation, [redacted] handicapping condition was described as "Perceptual/Communicative" (P/C) on the special education annual review documents dated April 21, 1988, August 27, 1987, and April 30, 1987 and on the triennial review document dated October 23, 1986. During the 1985-1986 school year his handicapping condition had been identified as "Significantly Limited Intellectual Capacity" (SLIC).

5. [redacted] indicated her approval of [redacted] individual education plans and her consent to his placements by signing all of the annual review

documents, all of the triennial review documents, and the special education reports reviewed by the complaints officer dating back to the 1981-1982 school year with the exception of the April 21, 1988 Special Education Report.

STATEMENT OF THE ISSUE

Whether or not the decision of the district to graduate [redacted] violates the requirements of the Act, its implementing regulations, and the State Plan under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142 in effect during the time in question, ("the State Plan") by denying Andre´ a free appropriate public education.

RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(18), 1412(1), and 1412(2)(B).
34 C.F.R. 300.4, 300.121, 300.122 and 300.300.
Article IX, Sections 2 and 15. Constitution of Colorado.
Sections 22-32-109(1)(t) and (w), 22-32-109.5, 22-33-104(2)(h), and 22-33-106(3)(a).
State Plan, Section IB.

FINDINGS

1. [redacted] was to receive services during the 1987-1988 school year based in part upon the provisions of a Special Education Report - Annual Review dated April 30, 1987. The document was to serve as a guideline from April 30, 1987 to graduation. Basically, during school year 1987-1988 [redacted] was to continue working on the goals outlined in detail on the IEP developed on October 23, 1986, with some modification. Emphasis was to be placed on the development of basic math skills. The characteristics of service involved continuing the program in graphic arts at Pikes Peak Community College and receiving instruction in reading skills and physical education with independent study in math.

2. [redacted] requested a staffing which was held on August 27, 1987, because she was concerned that [redacted] class schedule for fall of 1987 did not include math or English. Consequently, Career Math and English 5,6A were added to his schedule and reading skills was dropped, although the latter was apparently scheduled in conformance with the April 30, 1987 staffing recommendations. The Special Education Report - Annual Review

dated August 27, 1987 became the guideline for the provision of services to [redacted] from "8/87 to graduation."

3. On September 30, 1987, [redacted] schedule was changed again. Apparently, [redacted] and the school personnel agreed that the Reading Skills class was more appropriate for [redacted] than the English class, so he was rescheduled to a reading skills class.

4. The IEP developed for [redacted] in October of 1986, the terms of which were followed and readopted at subsequent staff meetings without much modification for the remainder of [redacted] high school career, resulted from a staffing in which [redacted] participated. The document itself reflects her participation and agreement. Specifically, on page one it notes that [redacted] "is on target for graduation." The IEP indicates how satisfactory completion of certain special education courses can earn credits for graduation. The document also shows that [redacted] was advised of her rights to due process and was given a copy of a document informing parents of their legal rights. Therefore, [redacted] had notice since at least October 1986, that the district considered [redacted] a candidate for graduation.

5. [redacted] schedule for fall semester 1987 at Mitchell High School included the following courses: Aerobics/Physical Education, Career Education Work, Career Math, Reading Skills, and Area Vocational Program/Pikes Peak Community College - A.M. Graphics. This schedule reflects what was called for in his IEP or what was added by agreement between [redacted] and the district. He satisfactorily completed these courses and received the corresponding credits toward graduation.

6. [redacted] schedule for spring semester 1988 was the same as his fall schedule. Similarly, he satisfactorily completed the courses in the spring and received the appropriate credits toward graduation.

7. The district has established minimum requirements for receipt of a diploma. A minimum of 44 credits is required to graduate. By policy and within specified guidelines, certain special education courses offered at Mitchell High School in which the course work, not the course content, has been modified to meet the needs of individual students may be used to fulfill specific subject area credit requirements for graduation.

8. As of August 1987, [redacted] had earned forty-five credits and in June 1988 he had earned sixty-one credits.

9. The Special Education Report - Annual Review dated 4/21/88 indicates the staffing committee's placement recommendation to be as follows:

TERMINATION OF STUDENT OR PROGRAM

X Graduated from school (New Placement).

10. A member of the staffing committee states that in making this recommendation the committee considered that [redacted] had met many of the goals set forth on the October 1986 IEP and on subsequent special education reports. The committee felt he had made satisfactory progress toward the remaining goals and had benefited from his program as outlined by his agreed upon IEPs.

11. [redacted] did not agree with the recommended placement. She did indicate by her signature that she received a copy of the Notice of Legal Rights.

12. In a document dated 5/12/88, attached to the April 1988 Special Education Report and submitted by both parties, it states that [redacted] met all the necessary credits for graduation but [redacted] requested a recess of the April 30, 1988 meeting until 5/12/88 at which time additional people were invited to the staffing. The document reflects that after two years, [redacted] has had a change of heart about graphic arts. He feels it is not challenging enough.

13. The document states that [redacted] was told that no student could remain in high school beyond the point of meeting graduation requirements or age 21. Apparently, [redacted] was informed of her right to appeal the graduation decision and indicated her intent to do so.

14. On May 13, 1988, [redacted] sent a letter to Dr. Robert Howell who was then the Director of Special Education. She requested a "deferment", whereby [redacted] could graduate with the 1988 Mitchell class but not get his diploma until such time as he received the classes which she felt he had been promised but not provided. It was her position that [redacted] had not accomplished all of his IEP goals, that his needs had been ignored and that he was a victim of the system.

15. Dr. Howell's response dated May 17, 1988 was not received by [redacted] until June 3, 1988. He reiterated that both special education students and regular education students are graduated by the district upon completion of the minimal number of credits, "regardless of whether all their educational needs have been met". He points out that the district would not

receive funding were it to serve Andre´ beyond graduation. He denied [redacted] request for a deferred graduation.

16. While the 5/12/88 staffing document and Dr. Howell's letter may imply that the fact that [redacted] earned enough credits for graduation was the only factor considered by the district in graduating him, the staffing committee member's statements and the analysis of [redacted] progress toward his IEP goals shown on the IEP documents indicate otherwise. Also, if the earning of credits was the sole criterion used for graduation, [redacted] would have been eligible to graduate prior to the 1987-88 school year.

17. On or about June 20, 1988, [redacted] sent a letter to Dr. Jaitly informing her that she was filing a complaint as her hearing request was denied. [redacted] felt that the delay in mailing Dr. Howell's response did not give her time to appeal the graduation decision. [redacted] has not alleged in this complaint that the district violated her due process rights.

18. The decision to graduate [redacted] was made by the staffing committee of which [redacted] was a part. No dissenting opinions from committee members other than [redacted] were written or have been submitted to the complaints officer for consideration.

19. [redacted] was provided services pursuant to an IEP that was developed in accordance with the Act. It was reasonably calculated to enable him to benefit educationally in the opinion of the entire staffing committee, including [redacted] as is shown by her signature. The staffing committee, with the exception of [redacted] was of the opinion that [redacted] had met or made satisfactory progress toward his IEP goals and had benefited educationally from his program, in addition to having met graduation requirements. No evidence has been submitted to substantiate the position that the staffing team was in error in recommending that [redacted]´ graduate based on these considerations.

20. The results of the placement tests which [redacted] took at Pike's Peak Community College are not persuasive evidence that [redacted]´ did not receive services appropriate to his needs as defined on his IEP. An IEP is not a guarantee that a student will reach a certain level of achievement. Further, the tests do not appear to have taken his handicapping condition into effect. For the complaints officer to find that the program offered to [redacted]´ did not appropriately meet his needs as defined on his IEP, documentation of this allegation is necessary. Such documentation has not been submitted.

21. [redacted] program schedule conformed to the characteristics of service agreed to and he received passing grades in his courses. There is no evidence that the IEP process or grading of [redacted] work was a sham. Rather, [redacted] feels that the teachers did not require enough from Andre to earn the grades that he received. Neither, in her opinion, did they require enough homework. Without more, the complaints officer is not in a position to find that [redacted] did not earn his grades or the credits he received for the courses he took and completed satisfactorily or that his teachers gave him grades he did not deserve.

22. A handicapped student may be graduated after satisfactory completion of an IEP reasonably calculated to enable the student to receive educational benefits if the IEP was developed in accordance with the procedures set forth in the Act. There is no automatic entitlement for a handicapped person to receive educational services under the Act until the age of 21. To require the district to continue to serve [redacted] after his graduation would be inconsistent with state law and practice applicable to other 19 year olds. Colorado law specifically allows districts to deny admission to students who have graduated and who are under the age of 21. Further, graduation is a change of placement decision which may be appealed by appropriately requesting a due process hearing. See Wexler v. Westfield Board of Education, 784 F2d176(3rd Cir.1986); In the Matter of H.L. Beaver III, (SEA WA. 1987), EHLR Current Decisions 509:148; Case No. 11909 (SEA NY, 1987), EHLR Current Decisions 509:254; Case No. SE-32-84, (SEA IL, 1984), 1984-1985 EHLR Dec.506:359; In re: Theodore V. (SEA MA, 1984) 1983-84 EHLR Dec. 505:287.

23. No information of exceptional circumstances nor legal argument has been presented to the complaints officer that permits a finding that the district must offer additional services to [redacted]. See In re: Donna R., (SEA MA, 1984), 1984-85 EHLR Dec.506:130 (state statutory requirements); Stock v. Mass. Hospital School et al, 1984-84 EHLR Dec. 555:550 (Stock I)(state requirements, due process rights at issue); Case No. SE-3-84, (SEA IL, 1984), 1983-84 EHLR Dec. 505:293, (recent switch in programs); In the Matter of Steven, (SEA MD, 1980), 1980-1981 EHLR Dec. 502:103 (state statutory requirements); In re: Lincoln Consolidated Schools, (SEA MI, 1982), 1982-1983 EHLR Dec.504:232, (state statutory requirements.)

Conclusion

The decision of the district to graduate [redacted] did not violate his right to a free appropriate public education under the Act. The staffing team followed the appropriate procedures and used the correct standards in recommending that [redacted] graduate.

Recommended Compliance Actions

None.

Case Number: 88:510

Status: Complaint Findings

Key Topics: Free Appropriate Public Education (FAPE)
IEP
Related Services
Transportation

Issues:

- Was the student denied FAPE by district's failure to provide services in accordance with IEP.

Decision:

- District denied FAPE by not providing transportation in district's vehicle as specified on the IEP.

Discussion:

- Fact that vehicle was being repaired for lengthy period of time should have prompted other arrangements.

Federal Complaint Number [redacted] 88.510
Findings and Recommendations

Preliminary Matters

1. The Complaint was received by the Federal Complaints Officer on October 26, 1988. The process for receipt, investigation, and resolution of the complaint is governed be the Education Division General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Sections 76.780 et seq and Colorado State Board of Education Policy No. 1280.0. The complaint was accepted for investigation on November 3, 1988 and December 27, 1988 was the date on or before which the issues raised in the complaint were to be resolved.

2. The complaint was filed by Ms. M. Claire Williamson, Senior Attorney, The Legal Center on behalf of [redacted] in the interest of their daughter, [redacted].

3. The complaint named as respondents Mr. Michael Pando, Acting Director for Special Education, South Central BOCES and Mr. Felix Garcia, Superintendent, Primero School District RE-1.

4. The investigation of the complaint included a review of [redacted] individualized education program for the present school year, a review of the correspondence among the parties and several telephone conversations with the parties and/or their representatives.

Undisputed Facts

1. [redacted] is a resident of school age of Primero School District RE-1 ("the district"). The district is part of the South Central BOCES. The BOCES coordinates the provision of special education and related services to students within the jurisdictions of its member districts. The district and the BOCES are responsible for providing special education and related services pursuant to the Education of the Handicapped Act, 20 U.S.C. 1400 et seq as they are the recipients of federal funds for this purpose. Judy Smith is a handicapped student.

2. Pursuant to an Individualized Education Program (IEP) developed for [redacted] at a review staffing held on May 12. 1988, she is to receive special education and related services in a day training program at Trinidad Junior High School during the 1988-89 school year.

3. Page 2, Section II of the IEP, under the heading "Transportation" states as follows:

> "Continue current arrangements with Primero School with parents transporting [redacted] to school with the use of a Primero District Vehicle."

4. The vehicle to be used to transport [redacted] to and from school was not available until November 8, 1988 because of needed repairs.

5. Prior to November 8, 1988, the district and BOCES did not provide transportation to [redacted] for this school year. [redacted] drove [redacted] to and from school until November 8, 1988.

6. On November 7, 1988, the district reimbursed [redacted] at the rate of $.20 per mile for the days he had to transport [redacted] to and from school. The district also provided some gasoline to [redacted]. [redacted].

Statement of the Issue

Whether or not [redacted] has been denied a free appropriate public education by the failure of the BOCES and the district to provide her with transportation in accordance with her individualized education program.

Relevant Statutory and Regulatory Citations

20 U.S.C. 1401(17), 20 U.S.C. 1412(2)(B), and 20 U.S.C. 1414(a)(5) and (6); 20 U.S.C. 794
34 C.F.R. 300.13 and 34 C.F.R. 300.349; 34 C.F.R. 104.33.
Fiscal Year 1989-91 State Plan Under Part B of the Education of the Handicapped Act As Amended By Public Law 94-142 Sections III and V.

Findings

1. The district and BOCES violated the requirements of the federal statutes and regulations by failing to provide transportation in the district's vehicle beginning on the first day of the 1988-89 school year. Such an arrangement was specifically identified as a related service on [redacted] current IEP.

2. However, the district's arrangement to pay [redacted] $.20 per mile plus provide him with gasoline was a reasonable compromise to enter into when the district vehicle was undergoing repairs as long as [redacted] was agreeable. Such arrangement could only be used on a temporary and short term basis in view of the specific provisions regarding transportation contained in [redacted] IEP. Any permanent or substantial change in the related services provided to [redacted] could only be initiated following a review staffing and agreement of the parties.

Recommended Compliance Actions

None. However, it is strongly recommended that any future repairs needed by the district vehicle be undertaken as quickly as possible so that a lengthy delay such as occurred this fall does not happen again. Further it is suggested that the parties agree in writing beforehand as to what will occur should the vehicle need repair and that this topic be a subject of discussion at the next review staffing.

Case Number: 88:511

Status: Complaint Findings

Key Topics: Extended School Year (ESY)
Free Appropriate Public Education (FAPE)

Issues:

- Whether or not the district violated the assurances in its application for funding under EHA by failing to provide FAPE in that services offered to students beyond the academic year are done so on an arbitrary basis and not on the basis of the individual need of each student.

Decision:

- District's guidelines comply with EHA provisions regarding FAPE.
- Guidelines were not consistently implemented and certain students did not receive ESY services based on an assessment of the students' unique needs.
- District failed to comply with the assurances in its application.
- Extensive monitoring and file review established to disseminate information to parents and staff and to insure implementation of guidelines.

Discussion:

- District had in place extensive guidelines relating to ESY services that conditioned the receipt of services on a staffing team's decision about the individual needs of each student.
- Evidence showed that district was not following own policy.
- Most students served in ESY programs received services three hours a day, five days a week and for a six week duration.

FEDERAL COMPLAINT NUMBER [redacted] 88:511
FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education (CDE) on November 22, 1988.

2. The complaint was filed by the Denver Association for Retarded Citizens (DARC), a Colorado not-for-profit corporation, on behalf of all handicapped students within the jurisdiction of the Denver Public Schools ("the district").

3. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of 20 U.S.C. 1221e-(3)(a)(1) and is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Sections 76.780 _et seq._ and Colorado State Board of Education Policy No. 1280.0.

4. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to a violation of federal law and rules in a federally funded program administered by CDE.

5. Because of the complexity of the issues raised by the complaint and the ongoing discussions and investigation, the deadline for resolution of the complaint was extended to March 30, 1989, with the consent of the parties.

6. The complaint was brought against the district as a recipient of federal funds under the Education of the Handicapped Act, as amended, 20 U.S.C. 1400 _et seq._ ("The Act").

7. It is undisputed that the district is the recipient of federal funds for the purpose of providing education and related services to handicapped students within its jurisdiction pursuant to the Act.

8. The investigation of the complaint included a review of the documents submitted by the parties, numerous conversations with the parties and their representatives, and a review of information available from the CDE.

II. STATEMENT OF THE ISSUE

Has or has not the district violated the assurances given in its application for funding pursuant to 20 U.S.C. 1414 by failing to provide handicapped children within its jurisdiction with a free appropriate education as defined in 20 U.S.C. 1401(18) in that services offered to students beyond the academic year are done so on an arbitrary basis and not on the basis of the individual needs of each student.

III. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(18) and (19), and 1414(a)(5). 34 C.F.R. 300.1 (a), 300.14(a)(1), 300.235, and 300.346. Fiscal Years 1989-91 State Plan Under Part B of the Education of the Handicapped Act As Amended By Public Law 94-142 Section V(E), and Appendix F.

IV. FINDINGS

1. The district submitted to CDE an application for funding pursuant to the Act dated September 21, 1987.

2. Based, in part, upon the assurances contained within its application, the district received federal funds to provide education and related services to handicapped students within its jurisdiction.

3. One of the assurances made by the district was that, in accordance with the Act, it would provide a free appropriate public education to each handicapped child including special education and related services to meet the unique needs of that child.

4. During all times relevant to this complaint, the district had in effect a policy entitled "Guidelines for Assessment of Extended School Year Programs" ("the guidelines").

5. Pursuant to the terms of the guidelines, the possible need for extended year programming beyond the duration of the district's scheduled school year, adopted pursuant to section 22-32-109(1)(n) C.R.S. must be considered for all students receiving special education from the district. Further, the guidelines provide that the need for an extended year program "shall be discussed with each child's IEP team during the IEP meeting" and that parents and/or guardians shall be "advised of the need for assessing their child's need for extended programming."

6. If a determination is made that the student is to receive extended programming, based upon the guidelines, "an individual determination regarding amount of extended year schooling based on the student's specific needs is required."

7. DARC contends that the district arbitrarily offered a one-half day program for five days a week of six weeks duration to handicapped students within its district beyond the academic year offered to all students and that such program was not offered based on the specific needs of each student. There are no specific allegations as to any particular student needing more services than were provided to prevent serious regression of previously learned skills.

8. DARC provided information relative to approximately 59 handicapped students served by the district during the summer of 1988. The information was provided in the form of affidavits and was unrefuted by the district (Girard affidavit 11/21/88 #1, Frederick affidavit 11/16/88, Girard affidavit 1/9/89 #2, McNett affidavit 1/17/89).

9. Of the 59 handicapped students, 54 were offered not more than one-half day, five days per week programs of six weeks duration, 3 were offered programs of greater duration, 1 participated in a supported living institute and 1 student was unavailable to receive services.

10. All of the students do not have the same handicapping condition. Of the 41 students for whom information is available, 27 of them have severe cerebral palsy and the others have conditions ranging from emotional disturbances to hearing impairment. (Frederick).

11. Specific information was provided as to the nature and extent of the discussions held during the spring 1988 IEP meetings for 14 students on the issue of extended year programs. In each case it was determined that the student was in need of services during the summer of 1988 but no assessment, evaluation, or discussion was held as to the student's specific needs in order for the IEP team to make a recommendation regarding duration of services. (Girard #2, McNett).

12. At no time before, during, or after the 14 IEP meetings mentioned above were the guidelines disclosed to the students' representatives nor were the students'needs discussed in conformity with the provisions contained in the guidelines during the IEP meetings (Girard #2, McNett).

13. During the summer of 1988, Dr. Fred Smokoski, Supervisor, Colorado Department of Education, Special Education Services

Unit, conducted a review of a random sample of 20 IEPs written for children who were scheduled to receive extended year services from the district during 1988. The students whose IEPs were reviewed have a variety of handicapping conditions.

14. Dr. Smokoski concluded, in part, that the need for extended school was discussed, based on a box to be checked on the IEP forms, and programming recommendations made for all twenty students. He was not requested to, and did not in fact, review the files for specific compliance with the guidelines.

15. Dr. Smokoski further stated, "It should be noted that not all students were scheduled for ESY services for the identical length of time. This is a positive comment. His comment specifically related to the number of hours per day and number of weeks of services offered, as evidenced by his handwritten notes.

16. Of the approximately 800 students for whom the district provided information, approximately 500 received extended year services for three hours per day and six weeks duration. These 800 students include approximately 200 students who, because of their service needs, are placed in alternative settings such as day treatment or residential programs. One hundred seventy eight of them received ESY programs, 64 of which were paid for by the district. (Caldwell Letter 1/30/89).

17. One of the district's reasons for placing students in alternative settings is because the students' needs cannot be met in school settings and following school calendars.

V. CONCLUSIONS

1. The district has in effect a set of guidelines which comply with the Act's requirements regarding the provision of a free appropriate public education, including extended year services, to each handicapped student within the district based on the student's unique needs.

2. The guidelines were not consistently implemented and some handicapped students served by the district did not receive extended year services during the summer of 1988 based on an assessment of their unique needs. Alamo Heights Independent School District v. State Board of Education 790 F.2d 1153 (CA-5 1986); Battle v. Commonwealth of Pennsylvania, 629 F.2d 269,(CA-3 1980); Crawford v. Pittman, 708 F.2d 1028 (CA-5 1983).

3. The overwhelming majority of students for whom specific information was provided received services during the summer of 1988 for 3 hours per day 5 days a week for 6 weeks duration. No evidence was presented to demonstrate that the duration of the services met, exceeded, or did not meet the unique needs of each student as discussed at the staffing.

4. The district failed to substantially comply with the assurances provided in its application for funding under the Act.

5. The district is in violation of the above-cited statutory and regulatory provisions and the provisions of the state plan.

VI. RECOMMENDED COMPLIANCE ACTIVITIES

A. DISSEMINATION OF GUIDELINES

1. Copies of the guidelines will be mailed with the notices sent to parents pursuant to 34 C.F.R. 300.345 when scheduling meetings for the purpose of developing, reviewing or revising a handicapped child's individual education program. This provision becomes effective on May 1, 1989 and shall remain in effect for one year. Thereafter, the guidelines may be distributed with the notice sent for any initial staffing to determine the need for special education services. A record of notification will be kept in each student's file.

2. Each of the ten Denver Public Schools' Special Education Department sector managers will be trained in the use and application of the guidelines on or before May 1, 1989. At a minimum, the training will include a review, explanation, and demonstration of application of the guidelines by supervisory personnel at DPS. Colorado Department of Education personnel may provide technical assistance, as requested.

3. Each sector manager will hand deliver copies of the guidelines to all special education personnel within the sector on or before May 1, 1989.

4. During the month of May 1989, the guidelines will be a topic for discussion and review during at least one sector meeting in each of the ten sectors, wherein special education personnel in each of the ten sectors participate. Specific attention will be paid to the use of the guidelines during IEP meetings and the standards to be applied to individually determine a child's need for extended year service.

OK ✓

5. The guidelines will be a discussion topic on the agenda of the DPS Special Education Advisory Committee at one of its meetings on or before June 9, 1989. All parents of handicapped children in the district will be invited to attend the meeting and such fact will be noted on the general notice of the advisory committee meeting customarily distributed by DPS. The topic of discussion will be set forth in the Notice.

B. CHANGES IN IEP FORMS

OK

6. On or before August 25, 1989, the forms for use in the IEP meetings will be modified to include a space where the staffing team will indicate in narrative form:
   a) The specific conclusions, and the basis therefor regarding eligibility of the student for ESY programs;
   b) The recommended duration of ESY programs and the basis for the recommendation including hours per day, days per week and weeks through the summer;
   c) whether the program set forth on the IEP is to be continued or modified and the basis for any modification; and

   a space to indicate the receipt by the parent of the guidelines with the meeting notice and their understanding of the contents thereof.

C. VERIFICATIONS

OK

7. Each sector manager will verify, in writing, to the Director of Special Services, that the training was attended, that copies of the guidelines were distributed and the guidelines were a topic of discussion at the sector meeting, as set forth in paragraphs 2,3 and 4. Copies of these documents will be forwarded to the Complaints Officer on or before June 19, 1989.

OK

8. The Director of Special Services or her designee will verify in writing to the Complaints Officer that the guidelines are being mailed in accordance with the requirement of paragraph 1. This written verification will be submitted on or before June 19, 1989 and will include copies of any cover letters sent with the document, of any instructions to staff, or of any other evidence to show compliance with that paragraph.

OK

9. The Director of Special Services or her designee will verify in writing to the Complaints Officer that those activities listed in paragraphs 2 through 5 have occurred and dates of compliance. The written verification will be submitted on or before June 19, 1989 and will include copies of the following: notice of sector manager training including date,

time, place, copy of agenda and training outline; notice of Special Education Advisory Committee Meeting inviting parents to discuss guidelines including date, time, place and copy of agenda; and dates, times, and places and outlines of discussions of sector manager meetings where guidelines were discussed.

OK 10. On or before September 1, 1989, copies of the new IEP forms will be forwarded to the Complaints Officer.

11. On or before July 10, 1989, the Complaints Officer will determine whether or not the terms of agreement contained in paragraphs 1 through 5 and 7 through 9 have been substantially complied with and will so notify the attorneys for the DARC and the District. If there is a failure to substantially comply, findings will be issued to recommend compliance within a specific time. Ok

D. MONITORING ACTIVITIES

12. On June 19, 1989, a random sample of the names of 25% of the total numbers of students whose IEPs have been developed or reviewed in meetings between May 1, 1989 and June 9, 1989 will be selected. The sample will be selected from the computerized alphabetical list of students whose IEPs were reviewed or developed between those dates. The most recently developed IEPs of those whose names are chosen will be available in the Directors office for review by CDE beginning on June 26, 1989. The following items will be reviewed: Ok

    A. Notification pursuant to paragraph 1.
    B. Narrative notes of staffing team (pursuant to paragraph 6 after August 25, 1989) regarding consideration of guidelines and the recommendations regarding extended year services.
    C. Goals and objectives for ESY services 1989, if any.

13. Of the students whose IEPs were reviewed pursuant to paragraph 12, CDE will randomly select a sample of one-half of the names and attempt to contact the parent/guardian/ or representative of the student by telephone. The telephone contact will seek the following information: Ok

    A. Whether or not the notification required by paragraph 1 was received.
    B. Whether or not the parent, guardian or representative knows what the guidelines mean.

C. For those who attended the IEP meeting, whether or not the guidelines were discussed and the nature of the discussion.

D. Whether or not ESY services were offered and on what basis.

OK

14. The processes discussed in paragraphs 12 and 13 will be repeated beginning on February 1, 1990 on a random sample of 12.5% of the IEPs of students developed or reviewed in IEP meetings between June 9, 1989 and the last day of the first semester of the 1989-90 school year. They will be available for review in the Director's office beginning on February 8, 1990. The review will focus on the extended school year programs recommended for 1990.

E. MONITORING REPORTS

15. On or before August 10, 1989 and March 26, 1990, for the two review cycles described in paragraphs 12 through 14, a narrative report will be submitted in writing by the CDE reviewers to the Complaints Officer describing the results of the reviews. Each report will include but not be limited to the following information: (All lists may identify students by number or other coding)

OK?

A. Evidence or lack thereof that notification was mailed pursuant to the requirements of paragraph 1.

OK?

B. A list of those students for whom there is no evidence in the file that the notification required by paragraph 1 was sent or who did receive the notice of the IEP meeting but who, the reviewers determined through their telephone contact, did not receive the notification required by paragraph 1 (List A).

OK?

C. A summarization of the type of notes and the characterization of the notes found on the IEP documents which relate to consideration of the guidelines, including after August 25, 1989 those made pursuant to paragraph 6.

OK?

D. A list of those students for whom there is no documentary evidence that the guidelines were discussed (List B).

OK-OK-OK

E. A list of those students for whom there is no documentary evidence that the guidelines were discussed but who, upon telephone contact, indicated there was such a discussion (List C).

OK?

F. Evidence or lack thereof that consideration of the guidelines was made on an individual basis.

OK?

H. A description of the types of programs offered to students as extended year services.

I. A list of those for whom there is no documentary evidence that the need for extended year services or the type of program offered was determined based on a consideration of the individual's unique needs (List D).

J. A list of those for whom there is documentary evidence that the need for extended year services and the type of programs offered was determined on an individual basis but such information is disputed by the telephone contact (List E).

K. A narrative report of the results of the survey conducted pursuant to item 13.

F. COMPLAINT OFFICERS ADDITIONAL FINDINGS

16. Within thirty days of the receipt of the reports described in paragraph 15, the Complaints Officer will issue a summary of findings to the parties or a request for additional information from the CDE reviewers if the report provided does not meet the requirements of paragraph 15.

G. REMEDIES

17. For those students whose identification numbers appear on List D, DPS will have 30 days from the issuance of findings to reconvene a staffing team to correctly consider the guidelines and make an appropriate recommendation regarding ESY for the next succeeding summer and to determine what additional services will be offered to the student to compensate for the failure to individually apply the guidelines. The nature of the compensatory services and their duration will be specifically described. Written confirmation that these staffings have occurred and a description of the resulting recommendations and compensatory education programs will be forwarded to the Complaints Officer within 45 days of the issuance of the findings.

18. For those students whose identification numbers appear on List E, if the total number of the list is less than 10% of the total contacts made, the parents of the student will be advised in writing of their right to request a due process hearing on this issue. Written confirmation of the notification will be forwarded to the Complaints Officer within 45 days of the issuance of the findings. If the total is greater than 10%, review staffings will be held, compensatory services discussed and confirmation provided pursuant to the guidelines set forth in paragraph 17.

19. For those students whose identification numbers appear on List C, the members of the staffing committees will be

notified in writing of the deficiency in the IEP documents and the parents will be advised of their right to have the documents amended to correctly reflect what occurred. Written confirmation that these activities occurred will be forwarded to the Complaints Officer within 45 days of the issuance of the findings.

20. For those students whose identification numbers are on List B and not List C, DPS will have 30 days to reconvene a staffing team to consider the guidelines and make the appropriate recommendation regarding extended year services for the next succeeding summer and to determine what additional services will be offered to the student for the failure to individually apply the guidelines based on the standards set forth in paragraph 17. Written confirmation that these staffings have occurred and a description of the resulting recommendations and compensatory education programs will be forwarded to the Complaints Officer within 45 days of the issuance of the findings.

21. For those students whose identification numbers are on List A only, copies of the guidelines with an explanatory cover letter will be sent within 30 days of the issuance of the findings and written confirmation that this occurred will be sent to the Complaints Officer within 45 days of the issuance of findings.

22. If any of the Lists compiled for the reports to the Complaints Officer contain the student identification numbers of more than 20% of the total sample reviewed, the Complaints Officer will so notify DPS in the summary of findings and DPS will contract with an independent consultant, from a list of qualified persons provided by CDE, to review all of the IEPs developed during the period from which the sample was drawn. All of the IEPs will be reviewed as to the existence of the discrepancy noted on the list. For all students within the group for whom the discrepancy is apparent, the remedy fashioned for those students on the sample list will be implemented for the additionally identified students. DPS will have 120 days from receipt of the summary of findings under this part to complete the activities specified herein. The independent contractor will submit a report to DPS which will be forwarded to the Complaints Officer.

23. If DPS does not voluntarily comply with the recommended activities outlined above within the timelines specified or within any timelines subsequently altered or extended by written recommendation of the Complaints Officer, the Complaints Officer shall notify the Commissioner of Education pursuant to paragraph 16 of Colorado State Board of Education Policy No. 1280.0.

/dt/FEDCOMP1

Case Number: L89:100

Status: Impartial Hearing Officer Decision

Key Topics: Free Appropriate Public Education (FAPE)
Behavioral Problems
Psychological Services

Issues:

- Appropriateness of student's current placement
- What is the primary handicapping condition?
- Appropriateness of services called for on IEP.

Decision:

- IEP offered to the student does not provide FAPE.
- Student should be placed in a highly structured self-contained setting.
- Student is entitled to all related services including psychological services.

Discussion:

- Effect of behavioral issues on handicapping condition of mental retardation and how they were not addressed in the IEP.

In re the Matter of:

[redacted]

By and through her parent

[redacted],

Petitioner,

v.

DENVER PUBLIC SCHOOLS, DISTRICT ONE,

Respondent.

FINDINGS AND DECISION

of

IMPARTIAL HEARING OFFICER

MICHELE M. LAWONN

Case #: L89:100

I.

INTRODUCTORY STATEMENT

THE DUE PROCESS HEARING was held on March 9, 1989, in the Administration Building of Denver Public Schools in Denver, Colorado. Jurisdiction is conferred pursuant to 20 U.S.C. §1415, the Education of the Handicapped Act and Part VII of the 1989-91 State Plan of the Colorado Department of Education.

Both the Petitioner and the Respondent chose to be pro se. Due to this fact, a Pre-hearing Conference was held at East High School, Denver, Colorado on February 17, 1989. At the Pre-hearing Conference, the due process hearing procedures were explained to the parties, including their right to be represented by an attorney. Petitioner submitted a list of school personnel which she requested to testify at the hearing and exhibits were exchanged by the parties.

Petitioner requested the Due Process Hearing on January 27,1989. Based upon the parties' statements, the issues presented for determination are: (1) Is [redacted] current special education placement at East High School appropriate; and (2) has the Respondent offered [redacted] a free appropriate public education under the Education of the Handicapped Act, 20 U.S.C. §1400 et seq ?

Section VII B(2)(g) of the 1989-91 Colorado State Plan provides that the hearing officer must render and mail out the Decision to the parties within 45 days after receipt of the request for hearing. However, Section VII B(2)(f) provides an extension of time of 45 days upon agreement by both parties. The parties did agree on the record at the hearing to the 45 day extension of time.

II.

A. STIPULATED FACTS

The following facts were presented to the parties by the hearing officer at the conclusion of the Due Process Hearing, as it appeared that these facts were not in dispute. The parties, particularly [redacted] ("Petitioner") were advised as to the meaning and consequences of stipulating to facts and that such stipulation must be made voluntarily. After this advisement, the parties stipulated to the following facts:

1. [redacted] was transferred from the Trainable Mentally Handicapped (TMH) special education program at Manual High School, Denver, Colorado, to the Educable Mentally Handicapped (EMH) special education program at East High School ("East"), Denver, Colorado, in February, 1987. [February 10, 1987].

2. [redacted] special education placement was changed from the East EMH program to the East EMH/EBD(Educable Mentally Handicapped

and Emotional Behavioral Disordered) program after an October, 1987, Individual Education Program (IEP) staffing at which [redacted]. [redacted] participated.

3. At the start of the 1988-89 school year, [redacted] was mainstreamed into the following regular education classes: sewing, computers, art, and ROTC.

4. Since her transfer from Manual High School to East in February, 1987, through October-November, 1988, [redacted] has had several suspensions from school due to disciplinary actions.

5. Based upon her school record (Exhibit 2), [redacted] has a long history of emotional and behavioral problems, which include moodiness and a lack of respect for authority figures.

6. On November 8, 1988, at an informal meeting held at East between [redacted] and several school personnel, Petitioner was offered an alternative educational placement for [redacted], consisting of half days in the EMH/EBD classroom of Mr. Robert Louis and half days in work-study. Petitioner refused this special education placement for [redacted], removed her from all Denver Public Schools' programs and has kept her out of school since that time.

7. At the February 17, 1989, Pre-hearing Conference in this matter, homebound tutoring of [redacted] was offered to Petitioner as a temporary alternative special education placement for [redacted]

until this matter is resolved.

B. FINDINGS OF FACT

This Hearing Officer makes the following Findings of Fact based upon testimony of the witnesses and the exhibits which were admitted into evidence at the Due Process Hearing, and the record of the Pre-hearing Conference:

1. [redacted], whose date of birth is July 13, 1971, is 17 years old and lives with her mother, [redacted], in Denver, Colorado.

2. [redacted] has been enrolled in the Denver Public School system since September, 1977, and was staffed into a SLIC (Significantly Limited Intellectual Capacity) special education program in February, 1978, at the age of 6 years 6 months. Her IEP for this SLIC placement indicates that [redacted] needed a structured learning environment and a small group situation. Her IEP review of May, 1978, indicates that she had an extreme behavior problem.

3. In April, 1979, [redacted] was staffed and her special education placement changed from SLIC, now known as EMH (Educable Mentally Handicapped) to MRSH (Mentally Retarded and Seriously Handicapped), now known as TMH (Trainable Mentally Handicapped). She continued in a self-contained TMH special education program until her transfer to East EMH program on February 10, 1987.

4. The April 18, 1979, Report of Psychological Evaluation by Connie Ferenc states that [redacted] performance on the Stafford-Binet Intelligence Scale placed her within the "moderately limited range of intellectual potential" with her overall development at four (4) years and her chronological age being 7 years 9 months. Her strengths at that time were gross and fine motor skills.

5. The first re-evaluation of [redacted] for this MRSH special education placement was done in March, 1983, when [redacted] was 11 years 6 months old. The January 26, 1983, Psychological Evaluation by Wendy Ebert, PH.D. indicates a full scale IQ of 48 on the Wechsler Intelligence Scale for Children-Revised (WISC-R). Ms. Ebert stated that [redacted] became generally resistant when denied her own way.

6. [redacted] had her next three year re-evaluation of her special education placement and an IEP staffing in May, 1986, when she was 14 years 9 months old. This 1986 re-evaluation is the last one done on [redacted] up until the present. She is due for re-evaluation in Sring of 1989.

7. The April 21, 1986, Psychological Evaluation of [redacted] by Linda A. DiDomenico (Exhibit 2(b)) indicates that [redacted] had an IQ of 45 on the WISC-R, and which falls into the "moderately retarded range" of intellectual capacity. Ms. DiDomenico stated that [redacted] strengths were in the areas of visual perception and visual motor coordination and "indicate that training in assembling parts into a whole or in operating basic single function equipment is appro-

priate for her". She recommended that training and work situations be supervised and structured for [redacted].

8. The May, 1986, re-evaluation and IEP staffing indicates that [redacted] appropriate behaviors were "a good sense of humor, apologetic, accepted by others, a group participant, and shares possessions". Her desirable vocational skills were work quality, duration and attitudes toward work. Her inappropriate behavior on this IEP was stated as "lacking stability, temper control, does not accept criticism, does not respond to authority figures, is not truthful, lacks courtesy, experiences mood fluctuations, lacks punctuality, and is manipulated by normal students."

9. The February 6, 1986, Social Work Summary of Richard 1. Hayes indicates that [redacted] continued to be moody both at home and at school. He stated that management and compliance were problems at home and that "[redacted] is a good candidate for counseling to help gain insight to her interpersonal difficulty. Deficits in cognitive ability, academic performance and social adaptive behavior continue to be of primary concern". He recommended that she continue in the MRSH program in order to meet her needs.

10. The January 31, 1986, report of Carol Loewecke, a nurse and a member of the staffing team, stated that the "staffing team discussed [redacted] lack of structure at home and her chances of getting into trouble. Would benefit from a group home."

11. [redacted] MRSH placement was changed on February 10, 1987, when she was transferred to the EMH special education program at East. There is no documentation in her school record, Exhibit 2, which indicates that any IEP staffing was held for this change of placement.

12. There was an IEP staffing for a change of special education placement on October 28, 1987, as evidenced by the Staffing Committee Record and Individual Education Program. This IEP indicates a change of placement from TMH to ED/EMH (Emotioally Disturbed/Educable Mentally Handicapped). [redacted] signed this IEP which lists [redacted] primary handicapping condition as Trainable Mentally Handicapped-severe and a secondary handicapping condition of Emotionally Disturbed/Behavior Disordered.

13. The educational/developmental area on the October, 1987, IEP indicates that [redacted] functioned on a "grade one" level in all areas. It further states that she performed at a low functioning level in the areas of adaptive and social behavior as indicated by parent, student and school personnel interviews. The least restrictive environments of self-contained and work-study were considered in her placement.

14. The Social Work Summary of Jay Breen, dated October 1, 1987 states that [redacted] had been involved in several fights at Manual High School and that the change in environment to East High School was seen as a way to avoid future incidents. Ms. Breen stated that [redacted]

becomes frustrated when she tries to do her work (while in the EMH classroom) and also that she becomes angry and loses her temper when her peers do any name calling.

15. The identical PART A PAGE 1 and PAGE 2 were used for [redacted] October, 1988, IEP staffing, with the date of 10/28/87 crossed out and 10/17/88 inserted. Petitioner did not sign the 1988 IEP which indicates a reduced day for [redacted]. There is no evidence in the record to substantiate her program changes to include mainstreaming into four regular education classes in the Fall of 1988.

16. Based upon Exhibit 2(a), documentation of disciplinary actions at East High School, during the period of February 27, 1987 to October 4, 1988, [redacted] had fourteen written disciplinary actions, seven of which resulted in over twenty-seven days of suspension from school. None of these suspensions were in excess of five days. However, her suspension on May 31, 1988, did result in her being kept out of school for the remainder of the school year by Petitioner.

17. The March 2, 1987 Memo from James E. Tracy, Principal of East High School states that [redacted] had several fight problems and that the placement at East was not the best placement for her. He stated further that "her frustration level appears to be extremely low. She tends to become totally uncontrollable once she is angered. There is no way to predict that [redacted] is going to have an emotional outburst." This memo was written approximately three weeks after her transfer to East.

18. In a letter dated April 7, 1988, Linda M. Bauer, [redacted] EBD/EMH special education teacher at East stated that the "disciplinary measures available to us - the pass room and suspension - have proven unsuccessful".

19. The October 24, 1988, letter of Jay Breen to Mr. Bill Lindsay of the Denver Department of Social Services P.E.T. Team (Exhibit 2(e)) gives a summary of [redacted] special education placements and her continuing behavioral problems. This letter traces [redacted] behavioral problems back to 1978, when she was re-evaluated and placed into the MRSH program.

20. Respondent's Exhibit 1, which summarizes [redacted] special education placements, indicates that her placements in East EMH Resource in September, 1987, and EBD/EMH with mainstreaming in Fall of 1988, were unsuccessful placements.

21. There was no testimony or evidence presented by Respondent which indicates that funding is in any way a factor in the School District's determination of [redacted] special education placement.

22. At the Pre-hearing Conference, the issue of [redacted] then current placement was discussed in order to assure compliance with the "stay put provision" of 20 U.S.C. § 1415(e)(3) which requires that "]d]uring the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the

parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child..." This Hearing Officer determined that [redacted] then current placement was the East EMH/EBD self-contained classroom. Petitioner refused this educational placement for [redacted]. As this child had been out of school since approximately November 8, 1988, and was not receiving educational benefit from any program, the parties were able to agree to an alternative placement of homebound tutoring for [redacted] during the pendency of this matter.

23. The Petitioner, [redacted], received the complete school record of [redacted] (Exhibit 2) at the Pre-hearing Conference of February 17, 1989.

24. The following Exhibits were admitted into evidence at the March 9, 1989, Due Process Hearing:

A - Petitioner's January 24, 1989 Letter requesting Due Process Hearing (received January 27, 1989)

B - Petitioner's Letter dated February 16, 1989

1 - Summary of [redacted] school placements by Respondent

2 - [redacted] Denver Public School record, with specific components designated as follows:

2(a) Documentation of Disciplinary Actions at East
2(b) April 21, 1986, Psychological Evaluation by Linda DiDomenico
2(c) September 23, 1987, Pyschological Evaluation by E. Michael Blasi
2(d) Report of Emma G. Jackson, RN dated October 26, 1987
2(e) Letter dated October 24, 1988 from Jay Breen to Bill Lindsay
2(f) Social Work Contact Summary of Jay Breen dated October 1, 1987

25. These witnesses testified at the Due Process Hearing: Petitioner [redacted] Helen Richards, PH.D.; E. Michael Blasi, PH.D.; Jay Breen, M.S.W.; Leonard Miles; Beth Celva; Robert Louis; Edward DuBose; and Michael Criswell. Dorothy Davis, a social worker with the Denver Department of Social Services, was scheduled to testify. However, she did not attend the hearing and Respondent decided to close its evidence without her testimony.

26. The parties presented these opening statements: (1) Mr. Erwin O. Koepsel, Supervisor of Special Education for the Respondent School District stated that the School District had tried to fulfill its legal obligation to service [redacted] by finding an appropriate special education placement for her, but that the Petitioner wants [redacted] completely removed from special education programs and placed into regular education classes. (2) [redacted] stated that [redacted] welfare is her main concern and that [redacted] has not been improving or learning during her special education placements of the past two years.

27. These witnesses presented the following testimony:

A. Petitioner, [redacted] testified that her daughter [redacted] has not learned anything during the past two years of special education placements and that it has been harmful to ship [redacted] to all the different schools. She stated that the reason [redacted] is handicapped is because she doesn't know how to read and that [redacted] does not belong in the "retarded" class. Petitioner expressed concern about [redacted] welfare and stated that the school district could have come up with a solution regarding [redacted] school placement. She acknowledges [redacted] "temper problem" but stated that it is a problem only if someone "messes" with [redacted]. Petitioner claimed that Mr. Leonard was prejudiced against his own race and that he did not treat [redacted] with respect. Finally, in response to this Hearing Officer's questions, she testified that she did not understand what [redacted] EBD/EMH handicapping condition meant, nor the intellectual functioning capabilities and limitations of [redacted], who has an IQ of 45.

B. Helen Richards, PH.D., school psychologist for the Denver Public Schools, who was involved with the MRSH (TMH) special education programs from 1983-87, explained the data on the April 21, 1986, Psychological Evaluation of [redacted] by Linda A. DiDomenico, (Exhibit 2(b)). She explained that [redacted], who has a full scale IQ of 45, is functioning roughly on the level of an average 8 1/2 year old child. She further stated that this IQ places [redacted] in a TMH classification which has an upper IQ limit of 55. Her professional opinion is that [redacted] has the potential of attaining only a "functional" reading level or the ability to have a sight word knowledge of words commonly used in the community.

C. E. Michael Blasi, PH.D., school psychologist for the Denver Public Schools and a member of the staffing team at East, testified that he performed a psychological assessment of [redacted] on September 23, 1987. He administered the Wechsler Adult Intelligence Scale - Revised (WAIS-R) to [redacted], which test tends to measure IQs high. She obtained a full scale IQ score of 56 which placed her in the moderate to mild level of mental retardation. Based upon this IQ score, he stated that her placement in the East EMH classroom was appropriate. He had observed during her testing that she had poor eye contact and her total affect and behaviors had indicated to him that "something else was going on with her". However, after the testing, Mr. Blasi had no further contact with [redacted]. In conclusion, Mr. Blasi stated that [redacted] difficulties with temper control and following directions from authority figures is not common to a child having a TMH handicapping condition and particularly to the extent seen in [redacted].

D. Jay Breen, M.S.W., a social worker with the Denver Public Schools and a member of the East staffing team, testified that she had been involved with [redacted] since her transfer to East High School in February, 1987. Ms. Breen stated that she had observed [redacted] in the EMH classroom as well as the EMH/EBD classroom. She stated that the EMH/EBD program was a more appropriate placement for [redacted] as when this student was observed in the EMH classroom, she would become easily frustrated when attempting to do her work and would then get up and leave this classroom. Ms. Breen further testified that the self-contained EMH/EBD program is the only program which East has that is appropriate for [redacted] and can meet her needs. She stated that any other placement would be up to the Denver Department of Social Services. In October, 1988, Ms. Breen referred [redacted] to the P.E.T. Team, in order to seek alternative placement for this child. See Exhibit 2(e). She has not followed through with this referral and does not know its status. She stated however, that Dorothy Davis, a social worker with the Denver Department of Social Services had contacted [redacted] approximately two weeks prior to this hearing.

E. Leonard Miles, Assistant Principal at East High School and in charge of student discipline, athletics, building maintenance, security, and transportation, testified that he had over eight years experience working in school discipline with junior high school and high school age students. He has worked with special education students as well as regular education students. Mr. Miles became involved with [redacted] disciplinary problems at East only after complaints were brought to him either by teachers, other students or school personnel. In all of his years of working in student discipline, Mr. Miles stated that he had never seen another child with as high a level of temper as [redacted]. He testified that it takes her a very long time to "cool down" and become rational so he can talk with her. His professional opinion is [redacted] does not understand fully the reasons for her time outs or suspensions nor the consequences of her fights. She understands only that something will happen to her if she fights. Using suspensions and time outs have not been an effective means of disciplining [redacted]. Finally, Mr. Miles stated that he is not prejudiced against any ethnic class.

F. Ms. Beth Celva, Assistant Principal at East High School who works with its special education programs, testified that the EMH/EBD program at East was new and had a community living skills emphasis. In her opinion, [redacted] has had many problems since her transfer to East, including truancy, the inability to get to class on time and significant behavior problems in the hallways. Ms. Celva attended the informal meeting at East on November 8, 1988, between Petitioner and various school personnel. She testified that at this meeting [redacted] was told there was no other program at East which Respondent could offer [redacted] to meet her needs, outside of the EMH/EBD program. In reference to [redacted] EMH/EBD special education placement, Ms. Celva stated that "this program is as appropriate as we can offer based on [redacted] needs". Finally, in her professional opinion, [redacted] major handicapping condition is her mental retardation, but her behavioral problems are the overriding issues.

G. Robert Louis, EMH/EBD self-contained special education teacher at East High School in Fall, 1988, has a degree in physical education and has taken classes in special education but has no degree or certification in this area. He testified that at most, [redacted] had attended his classes two or three days during fall, 1988. He staed he was aware that [redacted] had significant behavioral problems, including roaming the hallways and not attending any classes. It was his opinion that [redacted] does not belong in regular education classes but does belong in a self-contained program.

III.

CONCLUSIONS OF LAW

1. The October 28, 1987 and October 17, 1988 Individualized Educational Programs do not offer [redacted] a free appropriate public education as they are not in compliance with the Education of the Handicapped Act 20 U.S.C. § 1414(a)(5), 34 C.F.R. §§ 300.551-300.552, and PART X of the 1989-91 Colorado Department of Education State Plan.

2. Based upon the above testimony and Exhibit 2, the school record of [redacted], I find that this student has exhibited significant and severe emotional and behavioral problems which the Respondent has been aware of since May, 1978. These behavioral problems fit the criteria of "seriously emotionally disturbed" pursuant to 34 C.F.R. § 300.5(b)(8). It is clearly evident, that [redacted] emotional and behavioral problems have had such a pervasive and adverse effect on her education as to be her primary handicapping condition, with her other primary or secondary handicapping condition being her mental retardation.

3. Based upon the testimony and Exhibits 2, 2(b) and 2(c), I find that [redacted] is properly classified as Trainable Mentally Handicapped (TMH) not Educable Mentally Handicapped (EMH) and Emotionally Disturbed/Behavioral Disordered (EBD). Furthermore, her placements in all of the East High School special education programs were inappropriate for her, based upon her intellectual level of functioning and her long standing history of behavioral and emotional problems. These placements in essence only served to increase the frequency and intensity of her outbursts. Since February, 1987, [redacted] has derived little to no educational benefit from her special education programs and has been out of school an excessive number of days.

4. It is evident from Exhibit2(b) and 2 that [redacted] has many desirable vocational skills as well as strong visual motor and visual perceptual skills which need to be further developed and applied in a vocational setting. However, at the present, her severe emotional and behavioral problems are significantly hindering this development. [redacted] has the potential to be employed in a highly structured setting.

5. Based upon the evidence before me, I find that [redacted] should be educated in a highly structured self-contained environment where she can be closely supervised and which has a low staff to student ratio. It is apparent that [redacted] has significant difficulties functioning in an educational environment as large as East. Respondent needs to vigorously explore appropriate alternative

educational placements for her.

6. Based upon her testimony, I find that [redacted] does not fully understand the educational limitations imposed upon [redacted] by her IQ of 45 and her moderately limited range of intellectual functioning. Respondent needs to assist [redacted] in understanding and accepting the educational, particularly the reading ability limitations of her child pursuant to the requirenents of 34 C.F.R. §§300.13 (b)(2),(6),(8),(11).

7. Respondent needs to provide this student with all necessary "related services" as provided in 34 C.F.R. § 300.13, including that of psychological services.

IV.

DISCUSSION

This Hearing Officer finds, based upon all the evidence before her, that the Respondent has failed to provide a free appropriate public education for this student. The current educational placement for [redacted] of EMH/EBD which was established by her October 28, 1987 and October 17, 1988 IEPs is inappropriate and confers no educational benefit to this child.

The Education of the Handicapped Act requires that once a child has been identified as "handicapped" that she be provided a "free appropriate public education" defined as:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18). Established by the United States Supreme Court in Board of Education of Hendrick Hudson Central S.D. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), is the requirement that this education be sufficient to confer some educational benefit upon the handicapped child. The EHA requires the child have access to related services and specialized instruction which are individually designed through her IEP to provide such educational benefit.

As [redacted] severe emotional and behavioral problems were not addressed in either her 1987 or 1988 IEPs, and her intellectual functioning level was tested to be in the moderately limited range, I find that these individualized education programs were not reasonably calculated to enable [redacted] to receive educational benefit. It is clearly evident that a child can not derive educational benefit from an educational program which she does not attend. However, if the reasons for her non-attendance are because her unique and special needs are not being met by the program, then Respondent is mandated by the EHA to design an IEP from which [redacted] can derive educational benefit.

The EHA's requirement of "free appropriate public education" includes related services as well as special education services. In view of her long standing history of severe emotional and behavioral problems and the testimony of witnesses stating that her behavior is interfering with her ability to learn, her temper flare ups, moodiness and inability to interact with peers other than through fighting, I find it most disturbing that psychological services have not been provided for this child. There is ample evidence on the record that it has been previously recommended. [redacted] clearly needs psychological services and from an individual who is trained to work with children of [redacted] intellectual functioning level or the trainable mentally handicapped.

Respondent has complied with the mainstreaming provision of 20 U.S.C. § 1412(5)(B). However, [redacted] has not been successful in a less restrictive environment and may well derive educational benefit only from a segregated facility or environment. Respondent needs to explore these alternative educational placements more fully.

During the pendency of this proceeding, [redacted] shall continue with the homebound tutoring, unless the parties agree otherwise. This placement is not the most appropriate for her. She needs to be placed in a highly structured setting. Also, in view of the excessive number of days of school missed by this student, an extended school year should be considered.

[redacted] is due for her three year re-evaluation of her special education placement in Spring of 1989. This data needs to be obtained and utilized in the development of her next IEP. This re-evaluation and IEP staffing should be completed within the next sixty (60) days and a status report sent to this hearing officer.

Finally, the testimony that the East EMH/EBD program is as appropriate as Respondent can offer her based on her needs is not acceptable. I acknowledge that her needs are difficult to meet. However, [redacted] placement must be based upon her unique needs and not upon what is the best and most appropriate educational prorgam available to her.

V.

APPEAL PROCESS

Notice of Appeal must be sent to:

Colorado Department of Education
201 East Colfax Avenue
Denver, Colorado 80203

The procedure as set forth in the 1989-91 Colorado Department of Education State Plan, Section VII(2)(i) is as follows:

(1) Either party may appeal the decision of the impartial hearing officer to the Colorado Department of Education within thirty (30) days after receipt of the decision. Such appeal shall be communicated to the other party at the last address furnished by that party. (2) If there is no appeal, the decision of the hearing officer is final.

Dated in Denver, Colorado this 24th day of April, 1989.

Michele M. Lawonn

Michele M. Lawonn, #15117
Impartial Hearing Officer
1869 West Littleton Boulevard
Littleton, Colorado 80120
303-797-3300

CERTIFICATE OF MAILING

The undersigned certifies that a true copy of the FINDINGS AND DECISION has been placed in the United States mail, postage prepaid this 24th day of April, 1989, addressed to:

[redacted]

Mr. Erwin O. Koepsel
Supervisor, Special Education
Denver Public Schools
900 Grant Street
Denver, Colorado 80203

Ms. Cheryl M. Caldwell, Director
Department of Special Services
Denver Public Schools
900 Grant Street
Denver, Colorado 80203

Dr. Myron Swize
Colorado Department of Education
State Office Building
201 East Colfax Avenue
Denver, Colorado 80203

Michele M. Lawa

Case Number: L89:101

Status: Impartial Hearing Officer Decision

Key Topics: Assessment
Independent Educational Evaluation

Issues:

- Whether or not the child was appropriately assessed.
- Whether or not the parent is entitled to costs for independent educational evaluation.

Decision:

- Assessment procedures were adequate and appropriate.

Discussion:

- Extent of formal testing given to the student.
- Those persons administering the tests were well qualified.

DECISION

[redacted], by
and through [redacted]
[redacted], Grandmother and
Guardian, Petitioner

Thompson School District
R2J, Respondent

Case #: L 89: 101

IMPARTIAL HEARING OFFICER'S
FINAL DECISION

Impartial Due Process
Hearing held on:
October 24,1989
Loveland City Hall
500 E. 3rd
Loveland, CO. 80537

Issue: [redacted] contends that proper and adequate assessment procedures for [redacted] have not been done, and asks that the school district pay for the cost of an independent educational assessment.

General Findings:

[redacted] was born on July 27,1982, and is the grandson of [redacted], who is his legal guardian. He has attended the Thompson R2J School District schools since entering kindergarten.

[redacted] contends that she did not find adequate test results in the folder she was shown, and that proper testing for [redacted] has not been done.

On June 24,1989, [redacted] submitted a request in writing to Jack Hale, Superintendent of Schools, for an impartial due process hearing pursuant to Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973. At that time she requested that the school district pay for independent evaluation at the University of Northern Colorado. She agreed to put the request for a hearing on hold because a mediation meeting was scheduled for July 14.

In another letter to Jack Hale dated September 6 [redacted]. [redacted] asked that her request for an impartial hearing be reactivated.

Because of various extenuating circumstances both parties agreed to extend the 45 day period from the request to submission of a decision by the hearing officer.

I have determined, after studying the issue and the evidence presented to me that this hearing did relate to matters set out in Colorado laws and in PL 94-142.

Findings of Fact - Witnesses and Exhibits:

1. *The Rules and Regulations for Part B of the Handicapped Childrens education Act state (121 a 503b): " A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However,the public agency may initiate a hearing under 121a506 to show that its evaluation is appropriate."*

   In this case the school district did not initiate a hearing but the guardian did.

2. *[redacted] testified that she did not find adequate test results in the folder that she was shown, and that there were many contradictions and discrepancies in those that she did see.*

3; *The school district testified that the following formal testing was done for [redacted]*

Test Name	*Area*	*Date given*
Dial-R	*kindergarten screening*	*9/02/87*
Beery Test of Visual Motor Integration	*visual perception*	*12/02/87*
Motor Free Visual Perception test	*visual perception*	*12/87*
Basic School Skills Inventory (BSSI-D)	*basic skills*	*2/08/88*
Bruininks-Oseretsky test of Motor Proficiency(BOTMP)	*fine & gross motor skills*	*1/88*
Southern Cal.Sensory Integration Test	*sensory & motor functions*	*1/88*
Expressive One-Word Picture Vocabulary Test	*speech-language*	*2/8/88*
Bracken Basic Concepts Scale	*speech-language*	*2/8/88*
Columbia Mental Maturity Scale	*intellectual*	*2/9/88*
Test of Language Development-Primary	*speech-language*	*2/10/88*
Peabody Picture Vocabulary test	*speech/language*	*2/10/88*
Peabody Picture Vocabulary Test	*speech/language*	*9/20/88*
Clinical Evaluation of Language Functions	*speech/language*	*9/20/88*
Wepman Auditory Discrimination Test	*speech/language*	*9/20/88*
Beery VMI	*visual perception*	*9/21/88*
Illinois Test of Psycholinguistic Abilities (ITPA)	*auditory perception*	*9/21/88*
Woodcock=Johnson Psycho-Educational Battery	*achievement*	*9/21/88*
ITPA	*auditory perception*	*12/05/88*
Bracken	*speech/language*	*5/23/89*
Wide Range Achievement Test Level 1 (WRAT)	*achievement*	*5/24/89*

Beery VMI	*visual perception*	*9/9/89*
Woodcock-Johnson	*achievement*	*9/8/89*
Wechsler Intelligence Scale for Children (WISC-R)	*intellectual*	*9/11/89*
Structured Photographic Language Test	*speech/language*	*9/12/89*
Expressive One-Word Picture Vocabulary Test	*speech-language*	*9/14/89*
BOTMP	*fine & gross motor skills*	*9/14/89*
SCSIT	*sensory & motor functions*	*9/14/89*

4. Joann Hansen (School Psychologist), Nancy Johnson Resource Teacher at Truscott),and Ann Marie Scott (Speech/Language Specialist) testified regarding the assessment measures they had carried out with [redacted]

Decision:

The hearing officer in this case finds for the respondent, the Thompson R2J School District.

Testimony and evidence presented at the hearing have convinced the hearing officer that assessment procedures for [redacted] *were adequate and appropriate.*

Other matters, such as [redacted] *placement and progress, were addressed during the hearing, Although they were not included in the issue for which* [redacted] *requested the hearing, the hearing officer deemed the testimony relevant to that issue.*

The school district personnel who testified in regard to their administering the assessment measures were well qualified to do so, and their ~~their~~ explanations of the reasons for what [redacted] *saw as discrepancies and inconsistencies were convincing to me, and I hope alleviated at least some of her concerns.*

The variation in test results, even on the same test administered at different dates, may be due to various factors. A child can never do better than his best on a test, but may for a variety of reasons not do as well as he is capable of doing. That is one reason why no single test is ever sufficient to determine placement.

I felt that much of [redacted] concern and mistrust was due to breakdown in communication. She is a concerned grandmother and guardian who has done much reading and investigation in attempting to obtain for her grandchildren the benefit of the best possible educational program. It behooves the school district, even considering the constraints of limited personnel and time, to make every effort to help her to understand assessment measures and the basis for [redacted] program, and it behooves both [redacted] and school personnel to make every effort to keep their contacts cooperative and not adversarial.

These findings and the decision will be mailed to [redacted] and to the chief executive officer of the Thompson R2J School District. They should be reviewed by the Board of Education at their next regular scheduled meeting, providing the Board has ten days to review the report. The Secretary of the Board shall notify [redacted], in writing, of the date and place at which time the Board will review the report and take any action which may be based upon the review.

Either party involved in this matter may request a review of the local school board's decision by the State Board of Education. Such petition shall be filed in writing. Either party involved in this matter may further appeal the decision from the State to a court of appropriate jurisdiction.

Signature of Impartial
Hearing Officer:

Seymour E Wallach

Seymour E.Wallach,Ed.D. 10/10/89

Case Number: L89:102

Status: Impartial Hearing Officer Decision

Key Topics
Free Appropriate Public Education (FAPE)
Evaluation
Procedural Safeguards
Least Restrictive Environment
Burden of Proof
Attorney Fees

Issues:

- Did the administrative unit provide to the student a FAPE in the LRE supported by a written IEP consisting of educational instruction specifically designed to meet the student's needs and supported by necessary related services?
- Were evaluations complete?
- Was the IEP prepared properly?
- Were the parents offered procedural safeguards?
- Were services provided in the LRE?

Decision:

- Parents had burden of proof.
- Parents are entitled to reimbursement for tuition and transportation to private facility but not tutoring.
- Student entitled to independent evaluation at public expense.
- Staffing shall be convened to develop new IEP.
- District has burden of providing program that meets the needs identified by the independent evaluators at the school that child would attend if not handicapped before the student must re-enroll in public school.
- District must pay tuition for years in future until consensus of the staffing team that the student is ready for public school.
- District must continue to pay private tuition if it refuses to cooperate.
- Parents forfeit right to any future tuition or transportation expenses if they refuse to cooperate.

Case Number: L89:102
Cont'd

- Recommends attorney fees to parents although not within authority of IHO to award.
- Need to provide ongoing notice to parents of procedural rights.
- Clustered program not LRE.

Discussion:

- Notice containing right to independent evaluation on the initial form seeking permission to assess was insufficient.
- District's process of adding yearly "service plan" attachments to IEP document does not meet the technical requirements of the law.
- Nothing in IEP regarding time in regular education, current levels of achievement, meaningful goals understandable to parents. However, problems in IEP, in and of itself, are not enough to find that the district failed to provide FAPE.
- Parents were only advised of right to due process when initial consent for assessment was sought.
- Clustered program with cross-categorical, differing age groups in separate mobile units is not LRE.
- Providing same services in home school should be part of the continuum of services offered by the district.
- No evidence to support the district's responsibility to pay for tutoring or counseling.

DUE PROCESS HEARING,
SPECIAL EDUCATION, COLORADO DEPARTMENT OF EDUCATION
STATE OF COLORADO

CASE: [redacted] L89:102

FINDINGS AND DECISIONS OF IMPARTIAL HEARING OFFICER:
William F. Muth

IN THE MATTER OF: [redacted] through her parents, [redacted]

Represented by counsel: Elizabeth Banks Kolkoski

Petitioners,

v.

Cherry Creek School District No. 5
Dr. Richard Reed, Director of Pupil Services

Represented by counsel: Darryl Farrington

Respondent.

Prior to November 17, 1989, the Petitioners, [redacted] on behalf of their minor daughter, [redacted], sent a notice to Cherry Creek Public School District No. 5 (the District) requesting a due process hearing. A due process hearing was requested to resolve issues of placement and other issues surrounding [redacted] as set forth hereinafter.

On November 22, 1989, Colorado Department of Education, Special Education Services Unit advised William F. Muth that he had been selected as the Impartial Hearing Officer (IHO) to hear this dispute. Due to the interim holiday period, parties in this case could not be contacted until November 27, 1989. The Petitioners were contacted on this date and advised of their rights under the Education for all Handicapped Children Act, 20 U.S.C., Sect. 1415 and the Colorado Department of Education State Plan, Sect. VII. At this time the Petitioners advised the ~~IHO that~~ they were represented by counsel. The Petitioners further advised the IHO that they had no objection to the hearing being held in facilities furnished by the Cherry Creek School District No. 5. The Respondent, contacted by telephone, advised the IHO that they were represented by counsel and authorized their counsel to represent them in this proceeding. Counsels for the parties were contacted and tentative dates were established for holding a Pre-Hearing Conference and for dates to conduct the due process hearing. A notice was sent to Counsel for both parties establishing the Pre-Hearing Conference on December 8, 1989, and included requests for the parties to exchange lists of proposed witnesses and experts, copies of all proposed exhibits, and to confer concerning what matters of fact of law can be stipulated to. This notice was sent to the parties under date of November 27, 1989, in the form of a request for a pre-hearing statement. At that time a date for a due process hearing to begin December 18, 1989, was established and agreed to by the parties.

Under date of December 5, 1989, the IHO received from the Respondent a motion for an extension of time based on the need of the School District for an extension due to "school personnel not being available during the latter half of December, 1989." The Petitioners had no objection to an extension of time and the IHO ordered an extension with final decisions to be issued January 20, 1990, and set the date for the due process hearing to begin January 2, 1990. On December 8, 1989, the IHO received from the Respondent a motion for production of documents by the Petitioners. This motion was very broad and sweeping in its request, and Petitioners objected to the scope of the motion. Conferring with both the Petitioners and Respondent, the IHO was able to determine that such documents as were available to the Petitioners would or had been furnished to the Respondent. The IHO ruled that the Petitioners should furnish to the Respondent such documentation that existed which the Petitioners intended to introduce into the case, and such other documentation as could be positively identified by the Respondent. The Petitioners complied with this order from the IHO.

A Pre-Hearing Conference in this matter was held on December 8, 1989, and subsequently a pre-hearing order was issued by the IHO. At the pre-hearing conference, both parties submitted partial lists of witnesses they proposed and documentary evidence they proposed to use in the hearing. Neither parties submitted complete lists at the Pre-Hearing Conference. Statements of claims and defenses were set forth by both parties as were disputed and un-disputed facts. The issues in this case were also set forth at the Pre-Hearing Conference.

On the date of December 11, 1989, the Petitioners directed to the IHO a motion for clarification of issues. Arguments to the motion by the Respondent requested a dismissal of the Petitioners' motion for clarification of issues. The IHO's ~~ruling on this motion was~~ that the issues were as stated in the Pre-Hearing Conference. The issues in this case are: 1) the primary issue is "Did the Administrative Unit (Cherry Creek School Dist. No. 5) provide and does it now offer to provide [redacted] a free, appropriate public education in the least restrictive environment supported by a written I.E.P. consisting of educational instructions specifically designed to meet her unique needs, and supported by such related services necessary to permit her to benefit educationally," and 2), Secondary issue as they are relevant to and support the primary issue will be allowed as, "Did the Administrative Unit (Cherry Creek School Dist. No. 5) comply with the procedures mandated in EAHCA and the State Plan." Further, the IHO denied the Respondent's request to dismiss the Petitioners' motion for clarification of issues.

Under date of December 14, 1989, the Petitioners filed a motion for a production of documents by the Respondent. After conferring with the Respondent, it was determined and ordered by the IHO that the Respondent had complied with the Petitioners' request for documentation except for confidential information protected by the Colorado Public Records Act, and for certain materials not yet furnished which were subsequently furnished to the Petitioners.

The Petitioners claimed that the District failed to provide [redacted] with a free appropriate public education as set forth in the Education for All Handicapped Children Act (EAHCA) and the Colorado Department of Education State Plan (State Plan). The Petitioners further state that the District failed to observe and follow procedures as set forth under Sect. 1400 of the EAHCA and in the State Plan, and required the Petitioners to seek outside counseling and other accommodations for which the District has not offered payment, failed to properly evaluate [redacted] and are guilty of a number of other violations as issues that will be set forth hereinafter.

The Respondent categorically denies all of the allegations of the Petitioners and claims that the District has provided a free, appropriate public education to [redacted] and has met all of the other requirements under the law.

The Petitioners are seeking relief in the form of reimbursement by the Respondent for the cost of certain educational and related services and for reimbursement of attorney's fee.

A due process hearing in this matter was held before the Impartial Hearing Officer beginning January 2, 1990, at 8:00 a.m., at facilities provided by the District at 4700 S. Yosemite St., Englewood, Colorado. The hearing continued through January 3, 4, 5, 6, 8, 9, 10, and concluded on January 12, 1990. During the progress of this hearing there was a stipulation agreed by both parties to extend the due date for the decision by the Impartial Hearing Officer to January 31, 1990. At the time the hearing was convened there were no outstanding motions before the IHO, although both parties had reserved the right to enter motions and objections during the course of the hearing. At request of the parents of the petitioner this hearing was closed to the public. The interim placement of the student during the course of this hearing and awaiting the decision was not an issue.

The Petitioners argued that they were making charges against The District and seeking monetary compensation and as such should go forward with the burden of proof. There was no objection to this by the Respondent. The IHO ruled that the Petitioners should go forward and present the burden of proof in this matter.

In final arguments and summations presented on the last day of this hearing, counsel for the Respondent presented the following: "I also want to comment on the burden of proof. I believe that where parents have made a unilateral dual placement they should have the burden of proving that the school did not have an appropriate program; however, I do acknowledge that the law is unclear. The Scituate Case, which I have cited, contains a footnote indicating that ordinarily the parents, as the ones challenging, have the burden of proof; but, they also indicate that there is some contra-authority which suggests that procedural errors committed by the school may justify switching the burden of proof to the school to prove that it had an adequate program (see Footnote 3 on Page 1232 of Scituate Case). By this view if the hearing officer found that there were procedural violations in this case, then there would be some authority for shifting the burden to the school to show that it provided, or offered to provide, a free public education. We would note that the District does not necessarily lose the case because of the procedural errors, but only then acquires the responsibility for showing by preponderance of evidence that its' offered program was appropriate. I believe that it is a wrong conclusion in that the parents suing for reimbursement for unilateral placement should always bear the burden of proof; however, I also believe that the school has more than carried any burden it may have had and requests a specific finding to that effect to be made regardless of the hearing officer's decision on who, in fact, has the burden of proof."

In making the final decision and findings in this case, the IHO will take this request into consideration and make a comment thereon.

During the latter stages of this hearing the parties stipulated that all documentation originally proposed by both parties to be placed in evidence in this hearing should be considered as placed into evidence. This consists of Petitioners' documentation numbered 1-31, and Respondent's documentation numbered A-DDDD.

After the completion of the hearing process and prior to January 30, 1990, by oral motion of the parties through their counsel, a request was made to extend the hearing process with final decision due on February 21, 1990. This motion was granted by the hearing officer and completion of hearing process was extended to February 21, 1990.

FACTS

TERMS:

1. [redacted]r, [redacted]r,: Petitioners in this case on behalf of their daughter, [redacted] residents of Arapahoe County, Colorado, and living in the Cherry Creek School District. Referred to as [redacted] [redacted] and [redacted] [redacted].

2. [redacted],: 11-year old daughter of [redacted]n and [redacted] [redacted], principle in this case. Referred to as [redacted]e or [redacted].

3. District, School District, Administrative unit,: Cherry Creek Public School District No. 5, the Public School Administrative Unit and Respondent in this case.

4. Cherry Creek Pupil Services. A program within the Cherry Creek Public Schools responsibility for evaluation and placement of children with handicapping conditions.

5. Director of Pupil Services. The staff person in the Cherry Creek Public School District responsible for administration of the pupil services program. At the time of this hearing the position is held by Dr. Richard Reed.

6. Greenwood: Greenwood Elementary School. A school in the Cherry Creek Public School District and at the time of this hearing the home school for [redacted].

7. Holly Hills: Holly Hills Elementary School. A school in the Cherry Creek Public School District that contains a program for handicapped children that [redacted] was referred to.

8. High Plains program: A summer program operated by the Cherry Creek Public School District. [redacted] attended this program for at least one summer. There was no other information provided about this program.

9. SLLD, SLLD Program: Severe language and/or learning disabilities program. Four such programs operate in Cherry Creek Public School District. Self-contained programs to provide intense service for handicapped children. The one involved in this hearing is located at Holly Hills and serves 11 schools in the West area of the School District.

10. SL Program, Speech/Language Program. A program provided to handicapped students in the District conducted by a speech/language specialist. This program service would be included on the student's I.E.P.

11. LD, LD Program: Learning Disabilities Program. A program provided in the Cherry Creek School District to meet the needs of handicapped children through a variety of services. These programs exist in many of the schools.

12. CBS, CBS Program,: Curriculum Behavioral Specialist, Curriculum Behavioral Specialist Program. A specialist is the instructor who operates the CBS program. A program to provide behavioral remediation for a variety of problems. They serve the student directly or on a consultant basis to other teachers.

13. WISC-R,: A test used to determine the I.Q. or intelligent quotient of a individual. The I.Q. is usually expressed as a mean score arrived at from a series of tests.

14. Iowa Test,: Iowa Test of basic skills. A standardized test given to students to determine their national ranking in terms of a percentile compared to the national level of achievement. [redacted] scored in the lower one percentile.

15. Carrels, Carrells.: A shield placed around the student's desk to provide quiet, privacy, and diminish the distractions from adjacent activities. These are used at both Holly Hills and Havern Center.

16. Havern Center, Havern.: A private school located in Jefferson County, Colorado, that specializes in the education of learning disabled and handicapped students. This is the school where [redacted] was enrolled in September, 1989.

17. I.E.P.: Individualized Education Program, a written document describing the handicapped child's educational program, and developed at a staff meeting consisting of personnel familiar with the handicapped student's strengths and needs, and whenever possible, includes the parents. This is further described in EAHCA, Section 1401(19) and 34CFR 300.130.

18. I.E.P. Format of the Cherry Creek Public School District:

Individualized Education Program - Phase I, first page of the District's I.E.P. showing the eligibility status with strengths and weaknesses.

Individualized Education Program - Phase II, second page of the District's I.E.P. This can consist of as many "Page 2s" as required. This breaks down the student's program into environmental, regular education, and special education programing.

Individualized Education Program - Phase III, also referred to as Service Plan and "Page 4s". This page priorities the student's annual goals and objectives and shows the personnel resources, time-line, evaluation criteria, and degree of achievement.

19. Staffing. A meeting held where the parents are invited to attend, along with school personnel, to discuss the handicapped child's program. This could be at the initial meeting to write the first I.E.P., for annual reviews, or for the triennial reviews. Staffing may also occur intermittently during the year if necessary to review and discuss a student's program.

20. Annual Review. A staffing held at the end of each year to review the student's progress in terms of the I.E.P. during the past year. In the Cherry Creek Public School District an annual review for [redacted] was held in May of each year to review the past year's progress and write goals and objectives for the next year.

21. Triennial Review. A review held three years after a student is initially staffed into special education. The triennial review is mandated under the EAHCA and the CDE State Plan. At the triennial review the I.E.P. may be revised if required.

22. FAPE,: Free Appropriate Public Education. The designation used in the EAHCA and related regulations, and the CDE State Plan, that special education and related services are provided at public expense, meet the educational standards of the regulations, provided in an appropriate school setting, and are provided in conformity with the regulations. EAHCA, 1401(18). 34CFR 300.300.

24. LRE.: Least Restrictive Environment. Required by regulations to provide education for all handicapped children, so that, to maximum extent appropriate, they are educated with children who are not handicapped. 34CFR 300.550.

25. Cross-categorical, multiple-categorical, non-categorical. Refers to placement of handicapped children. Cross-categorical and multiple-categorical refer to placement of special education students in classroom settings with children with different disabilities, non-categorical refers to keeping students with similar disabilities in the same classrooms, i.e., LD students would not be in classrooms with mentally retarded students.

26. EAHCA.: The Education for all Handicapped Children Act, as amended through June, 1987. This is the Federal regulation that provides for free appropriate public education of all handicapped students.

27. 34CFR.: The Federal regulations that provide in more detail the implementation of EAHCA.

28. CDE State Plan, State Plan,: Colorado Department of Education State Plan for the education of all handicapped

students. This plan contains the rules and regulation under Colorado statutory law to implement the Federal regulations. The State Plan is reviewed every few years and updated and revised as required. The CDE State Plan closely follows the regulations of 34CFR.

29. Rowley. - Board of Education v. Rowley, 458U.S. 176, 102S.CP3034(1982). A landmark case decided by the Supreme Court, used extensively as a reference throughout other cases and decisions. The major impact of this case was to set a determination that, "the actual requirements of a free appropriate public education is satisfied when the state provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction.

30. Burlington Case. - Burlington School Committee v. Department of Education of Massachusetts 5S.CP.1996(1985), another landmark case decided by the U. S. Supreme Court and widely quoted in decision making for other hearings. A major finding in this case was, "The grant of authority to a reviewing court under 1415(e)(2) includes the power to order school authorities to reimburse parents for expenditures on private special education for a child, if the court ultimately determines that such placement, rather than a proposed I.E.P., is proper under the Act."

31. IHO,: Impartial Hearing Officer, Impartial Due Process Hearing Officer. A hearing officer selected to conduct a due process hearing in accordance with the regulations set forth in the CDE State Plan, Part VII. The hearing officer conducts the hearing and writes a decision setting forth the finding of facts, discussion of the issues, and presents an order to the involved parties.

32. DPH, Due Process Hearing. The hearing conducted by the IHO in accordance with regulations set forth in the CDE State Plan.

CASE FACTS:

1. At the time this hearing was convened [redacted] was an 11-year old girl, the daughter of [redacted]. The [redacted]s lived in Arapahoe County, Colorado, in the jurisdiction of the Cherry Creek Public School District No. 5. [redacted] home school was Greenwood Elementary School where she entered kindergarten in September, 1984. [redacted] completed kindergarten at the end of the 1984-85 school session. Her parents testified that up to and through her tenure in kindergarten they did not notice or have any indication that she had learning disabilities. There is nothing submitted in

evidence from the school records to indicate that she had any problems in kindergarten.

2. In September, 1985, [redacted] enrolled in Greenwood as a first grade student.

3. A document "Permission for Assessment" from the District was signed by one parent, [redacted], on September 13, 1985. This document, sub-titled "Consent Statement", indicates that by signature the parent gives permission for an evaluation of the child by the Cherry Creek Pupil Services staff. The document indicates that an evaluation may include interviews and assessment with one or more of the following: 1) Special Education teacher; 2) Speech/Language Specialist; 3) Nurse; 4) Social Worker; 5) Psychologist; 6) Hearing Specialist; 7) Vision Specialist; 8) Sensory Motor Specialist.

This form contains the statement, "The results of the evaluation(s) will be shared with you."

This form also includes the following: "The evaluations are made under the provisions of the Education of the Handicapped Act, PL 94-142, Rules and Regulations applicable thereto, Colorado Statutes, Rules and Regulations of the Colorado Department of Education and Policy, Rules and Regulations of the School District. A parent and/or legal guardian is provided certain rights, including:

1. to examine your child's records;

2. to confidentiality of information relating to records of proceedings;

3. if you disagree with the assessment made you may secure and independent evaluation at the school's expense;

4. to grant written consent prior to pre-placement evaluation or initial placement of child into a program;

5. to have your child protected in evaluation procedures;

6. to have your child provided a surrogate parent;

7. to have your child provided an appropriate educational program in the least restrictive environment;

8. if you disagree with the assessment and/or placement results, you may have an impartial due process hearing on the issues of disagreement;

b. The Speech/Language evaluation conducted by Mary Daddio, recommended placing [redacted] in a learning disabilities program to afford more small group instruction. She further recommended "Everyone in [redacted] environment, teachers and family, should encourage self-expression."

c. The learning disabilities teacher indicated a series of strengths and weaknesses and recommended placement in Learning Disabilities Program for remediation of visual motor and visual perceptional weaknesses. Remediation will focus on reading and written language skills.

d. [redacted] regular education teacher, also was involved in the evaluation and referral. She indicated that [redacted] seems to have more ability than she is showing, but also noted she is very distractible in class - off task most of the time.

5. On October 3, 1985, the parent, [redacted], signed a "Placement in Special Programs" form, checking the item saying, "I accept the Special Education Staffing Committee's recommendation for placement of my child." The placement noted was learning disabilities program. This form contained the following paragraph: "Enrollment in a special program should not be interpreted as meaning permanent placement in the program. Each child's educational program will be reviewed at least once during the school year. The parents will be notified by the committee if it should be determined that the child can no longer benefit from the program. Alternative placement may be indicated if it is determined the child's needs may be better met in another program. Termination for special education programs will be made when it is determined by the staffing committee that the special education program is no longer needed. Parents have the right to appeal to the Director of Special Education if they do not agree with the recommendation by the staffing committee."

6. The social worker's assessment was done for a Staffing to be held for the development of an I.E.P. The social worker's assessment states "I concur with recommendations to place [redacted] in the Learning Lab, and would also suggest the family consider family therapy in order to better deal with an emotionally stressed home/family environment." There is no notation or indication that the recommendations for therapy was or was not connected with the provision of educational benefit. The social worker's report was signed by Michael B. Shellenberg, School Social Worker.

7. On October 3, 1985, a staffing was conducted and was recorded on a document known as Individual Educational Program, Phase I, with accompanying Phase II pages. This document is not signed but indicates that present were the parents, [redacted], the regular teacher, and a series of school personnel identified only by initials inserted on the document. This

9. to be given prior written notice within a reasonable time of action relating to identification, evaluation, or educational placement of your child, and other matters;

10. to revoke this consent at any time."

The signing of this statement by the parent(s) indicates consent.

4. An evaluation/assessment was conducted in September and October, 1985, by staff of the District. Of particular interest to the case at hand are the findings and comments from the following District staff. ·

a. The Psychologist's report of 9/85, and signed District Psychologist, Marilyn B. Anderson, notes the following: "Assessment procedures were the WISC-R, Bender-Gestalt, human figure drawings, observations during formal testing and in the classroom. On the WISC-R [redacted] achieved a verbal scale I.Q. of 105, a performance I.Q. of 91, and a full-scale I.Q. of 98, placing her overall in the average range. This may not be a valid score because [redacted] had already practiced on at least one of the performance scale sub-tests, Objective Assembly. Nevertheless, the discrepancy between the verbal and performance scale is significant. On the Bender-Gestalt designs, [redacted] had a difficult time as well. Her fine motor control was poor, she frequently had to turn the paper 90 degrees to complete a design, and her organization on the paper space was random......overall quality was about a 4-1/2 year old level." Summary and Suggestions: "[redacted] is a 6-9 year old girl who currently functions in the average range of intelligence on the WISC-R. The validity of the current scores on this test should be questioned because of previous practice on at least one of the sub-tests. In general, [redacted] has strengths in the areas of abstract verbal reasoning and understanding.....[redacted] has difficulties in areas of visual perception with problems in visual sequencing, visual-spatial organization, and fine-motor control and coordination. ......[redacted] seems generally to have a low level of energy.

[redacted] could benefit from resource room help with her difficulties with visual-perception, visual-motor expression, short attention span and memory problems. Because anxiety and negative feelings also appear to significantly interfere with her performance and she usually seems angry, sad or just hopeless, counseling could be extremely beneficial in helping her to mobilize her energy for doing schoolwork and directly expressing her feelings about her problems, and to feel more hopeful and positive about herself. It may be that some of [redacted] unhappy appearance may be related to her skill-level difficulties and her feelings about herself because of them."

document states the strengths and weaknesses of [redacted] and contains a Certification of Eligibility: The following handicapped conditions exist which prevent [redacted] from receiving an appropriate education without special education services. "Delays in visual motor integration and motor speed directly interfere with achievement in reading and written language readiness." Some of the weaknesses noted are visual-motor integration, receptive language and other weaknesses that had been determined from the previous tests. There is also a notation of "low self concepts, exhibits tension and anxiety when stressed." "Problems with auditory memory and organization, variable attention to tasks and motivation levels, tends to five up when frustrated." The Phase II pages show the "Prioritized educational needs assessment, and how strategies will be accomplished in regular education and special education."

8. On October 18, 1985, a meeting identified as an I.E.P. meeting was held. Although there is no record of a prior notice for this meeting, the parent, [redacted], attended and signed the I.E.P., Phase III, Service Plan (referred to in testimony as, "Page 4s.") This I.E.P. Phase III was formulated giving statements under the column, "Prioritized Annual Measurable Goals (with specific objectives listed)." On this document identified as a Service Plan, it indicates that [redacted], the learner, will demonstrate a growth of one year in reading (the objective decoding and comprehensive). There are additional goals and objectives listed in the same manner. Goals are written out in longhand, and objectives are written under them in a (parentheses) format. Some have only goals and no objectives. The personnel resources are listed as LD teacher - no name is given. Time-line is listed as September, 1985 till May, 1986, 40 minutes, four times each week, then an evaluation criteria is shown. It is explained by the District through testimony that the original I.E.P.s sets forth the strengths, weaknesses and eligibility statement, and where services are to be accomplished. The Phase III Page then shows the goals and objectives and how they will be evaluated and eventually the achievement of these goals and objectives.

9. On January 17,1986, Social Worker, Michael Shellenberg, made a notation in the records, which was entered in evidence, "called [redacted], very strongly urged her to follow through with family therapy referral. Also recommend that [redacted] be evaluated by her Pediatrician."

10. On May 23, 1986, an annual review meeting was held to review the I.E.P. This meeting was attended by school personnel and one parent. The objective of learning to print the alphabet was noted as obtained. Other objectives remained as objectives in areas of weaknesses except "a demonstration of a year's growth in receptive language skills" which showed good growth. A Certificate of Eligibility for handicapped conditions on this

I.E.P. page was, "delays in auditory discrimination and visual motor integration directly interfere with achievement in reading and written language."

11. At this same May 23, 1986 meeting, an I.E.P., Phase III was written for the next school year, containing of the same goals, i.e., the learner will demonstrate a growth of one year in reading, the learner will demonstrate growth in written language skills, the learner will demonstrate the ability to read 100 most frequently used words, the learner will demonstrate a growth of one year in visual motor integration. Short term objectives for each of these goals were devised with the evaluation criteria. Time in the L.D. Lab was increased to five hours a week. An additional Phase III Page was added to provide for a Speech/Language Specialist.

12. [redacted] entered Greenwood in September, 1986, as a second grade student. She was still maintained primarily in regular education with five hours a week with the LD teacher and a speech/language specialist.

13. In February, 1987, the parents took [redacted] to a Doctor of Optometry for a visual evaluation due to visual screening. On the doctor's recommendation, in addition to wearing glasses, was a program of optometric vision designed to improve the skills listed as deficient in his report. The doctor recommended this as a therapy.

There were no records presented at the Hearing to indicate the scope of this service plan, but there is a notation on a District health service report that [redacted] was "seeing Lynn Hellerstein for visual therapy.

14. In May, 1987, the annual review of [redacted] I.E.P. was held. The evaluation showed minor improvements in reading and that she remained weak in the remaining objectives, which still required improvements. In the same meeting of 5/15/87, an I.E.P., Phase III Page was drawn up for the next year. The goals remained the same but the time with the L.D. teacher was to be increased to 1-1/2 hours each day.

15. [redacted], [redacted], and one other child (an older brother to [redacted]), attended Mental Health therapy sessions during the 1987-88 school year.

16. [redacted] entered Greenwood as a third grader in September, 1987. A meeting was held November 6, 1987. Entered into evidence was a notice that a meeting would be held on November ~~6th.~~ The notice is undated as to year. It was brought in by testimony that this notice was sent to the [redacted] for a meeting to be held November 6, 1987. At this meeting the Administrative staff made a recommendation that [redacted] be placed in a self-

contained learning disabilities program operated by the District. This placement would be in a school known as "Holly Hills," which was not her home school. The parent, [redacted], rejected this recommendation of placement by signing a form, "Placement in Special Programs," on a pre-printed line, stating, "I do not give my consent to the indicated placement recommendation of the Special Education Staffing Committee." She inserted the words at "this time." At the same meeting the parent, [redacted], did sign a similar form accepting "The Special Education Staffing Committee's recommendation for special placement of my child." The program placement was to be "Curriculum Behavior Specialist Program." These "placement in special program" notices contain the same format and same paragraphs about, "subject to appeal to the Director of Special Education," as was reiterated hereinbefore.

17. The CBS Program was written up in an I.E.P., Phase III Page, in February 8, 1988 and signed by the parent, [redacted]. Four goals were listed on the I.E.P. page. Time-line was to be 2/88 through 5/89. Evaluation criteria was - "observation." There were no specifics given for hours per day or per week, or where the program would be located. The special education teacher responsible for this program, Sandy Robinson, testified that she worked with [redacted] approximately 20-30 minutes per session, and also consulted with classroom teachers around behavior issues. She testified that she could not recall if she had notified the parents that she was working with [redacted] and indicated the services began around November 6, 1987. She further testified that the reason for delaying the issuing of the I.E.P., Phase III, was to give her time "to get to know the child before giving a lot of goals for them, because it's really hard unless you know a child to know their needs, especially when you are working on behavioral needs."

18. On May 19, 1988, an annual review of the I.E.P. was held and the I.E.P. for the following year was developed. Goals and objectives remained very nearly the same as the previous year. The time with the LD teacher was extended to 1-1/2 hours each day. There was no notations about time or program in regular education.

19. [redacted] attended a summer program, "High Plains", in Summer of 1988. This is a district sponsored summer program. There was no I.E.P. presented that refers to this program.

20. According to the District social worker report dated 3/23/88, [redacted] "met with a tutor with a learning disabilities background twice a week to work on reading and math." It appears that this occurred during Summer of 1988.

21. a. [redacted] entered Greenwood as a fourth grader in September, 1988. A notice of the triennial I.E.P. review was

sent to the parents, and on September 23, 1988, the triennial review of her I.E.P. was held. Staff members and parents attended. Staff members, including speech/language specialist, social worker, learning disabilities teacher, psychologist all recommended that [redacted] continue in the learning disability program, itinerant behavior program, speech/language program on a consultation basis, and continue in consultation with classroom teachers. It was noted by her L.D. teacher, from test she gave for the triennial review, that [redacted] still demonstrated weaknesses in visual motor integration, auditory discrimination skills as they relate to reading, visual perception skills, and is distracted by auditory/visual stimulus. The parents signed an acceptance of continued placement in the learning disabilities program and other programs as recommended.

b. Psychological evaluation prepared for this triennial meeting contained the following recommendations: "[redacted] appears to be a child with multiple needs. While academic, cognitive and processing issues are of quite a concern, her emotional status is this Psychologist's greatest concern, in that it globally affects her availability to learn as well as [redacted] relationships. Though her attention is poor, it is felt to be primarily related to excessive pre-occupation and her depressed mood. A self-contained setting should be considered to provide the necessary individualization and structure needed to give [redacted] a successful school experience. Mental help and/or IBD support continues to be appropriate. It is also recommended that [redacted] be further assessed regarding attention deficit as well as depression regarding medication. Though not required for safe or adequate education, outside family and for individual therapy should be considered to further explore the areas of conflict raised by this study." This report was signed by the School Psychologist, Robert Robins.

c. The speech/language evaluation from a series of tests stated that "[redacted] demonstrates language skills within the average range. [redacted] no longer exhibits a great enough discrepancy between her cognitive ability and language skills, therefore, ceases to qualify for direct speech/language services. Recommendations: Continue placement in the learning disabilities and an itinerant behavior program for direct services. Continue in the speech/language on a consult basis."

d. A social history workup for the triennial included, in part, "concern around [redacted] academics has continued to grow and she has gone to higher grade levels. [redacted] continues to have many difficulties in the classroom (please see reports by LD teacher). ......At this time a self-contained learning disabilities program was recommended as [redacted] needed much individual help and was falling further behind her classmates in her academics. .... Parents refused the recommendation of a self-contained placement, and has continued to reject this option, feeling it would be more harmful to [redacted] self-esteem than beneficial academically. Prior to beginning fourth grade, [redacted] was enrolled in summer school at High Plains where she attended throughout June and July. She also met with a tutor with a learning disabilities background twice a week to work on reading and math. Her parents read with her at home and did flash cards with her every day. [redacted] continues to struggle with academics and her application continues to be minimal. Under summary of this report, it states "[redacted] is a fourth grade student who is receiving special education services along with much outside help, and continues to fall behind her classmates in academics. Concerns are great around both her academic and social/emotional functioning. ....[redacted] parents again discussed a self-contained program for [redacted]. Neither parent seemed willing to take [redacted] from her home school, but they agreed to view a self-contained learning disabilities program to see what they thought. [redacted] is frightened that [redacted] will be placed with mentally retarded students. Parents also discussed retention, although [redacted] teachers do not see this as a helpful strategy. Under Needs: "[redacted] needs continued help regarding her learning disabilities. [redacted] also needs continued help in the areas of self-esteem, motivation and peer relationships." This report was signed by Cam Short, School Social Worker.

22. In October, 1988, [redacted] was given the Iowa Test of Basic Skills. Composite score in these skills placed her among fourth grade pupils nationally, just above one percentile, meaning that [redacted] scored better than one percent of fourth grade pupils nationally, and 99 percent scored as well or better. Notation on the test was that [redacted] overall achievement appears to be low for her grade.

23. At some point in the Spring of 1989, the parents contacted a School Board member of the District and requested assistance in getting more time in LD programs for their daughter. As a result of this call, a meeting was held on March 9, 1989, with the parents, Dr. Reed, Director of Pupil Placement, Cathy lines, Coordinator of Pupil Services, and Carl Guthals, Principal of Greenwood Elementary School. The purpose of the meeting was described by Dr. Guthals as a care and concern meeting of teachers in special services were [redacted] was described as having learning and social difficulties. According to testimony entered into the record, at this meeting the request was again suggested that the SLLD Program at Holly Hills be reconsidered. The parents reported that [redacted] had visited Holly Hills' SLLD Program and felt that due to the make-up of the student population and the confinement of the program it would not be suitable for their daughter. Presented a discussion of [redacted] needs and the concerns of the [redacted]. The parents indicated their concern that placement of their daughter in the Holly Hills Program would continue to affect and lower her self-esteem and therefore would be a danger to her if she was placed

in the program. The parents also indicated some concerns about some of the treatment [redacted] had received in her current programming. Requested an increase in the program at Greenwood and rejected the move to Holly Hills. It was then determined that a Staffing would be held on March 21, 1989. Prior to that date a child study would be held with the appropriate members of the Greenwood faculty to reexamine the needs that [redacted] has and consider the adequacy of the program that she is currently in.

24. A letter dated 3-14-89 was sent to the parents confirming that [redacted] was receiving six hours and 25 minutes of direct special education services in her current program. It was later stated in Respondent's testimony that this letter was in error as regards the amount of time.

25. As a result of the March 9, 1989 meeting, another meeting was held on March 21, 1989, at which time it was determined that [redacted] special education services would be increased to twelve hours and 25 minutes a week. This would consist of nine hours and 55 minutes in the L.D. program, one hour and 30 minutes of Speech and Language, and one hour with the CBS Program. Nothing was placed into evidence or by testimony to indicate that an I.E.P. was written or revised to cover this additional service.

26. On May 31, 1989, an annual review was held for the existing I.E.P. and the annual achievement check was done. Up to this point the achievements developed by [redacted] along with the list of progress reports, indicate that she has been making slow but steady improvements in her program. However, she is still functioning at somewhere between the second and third grade level in most of her subjects. The I.E.P. that was reviewed indicated basically the same goals as before. Short term objectives for the next year were not written. [redacted] progress reports and report cards tend to indicate that she is making slow progress. At early stages in her schooling, mathematics was one of her stronger points, now seems to have slipped to require considerable help and assistance in her math. The parents feel this is due to her inability to read. The District has continued in the last two years to encourage the parents to place [redacted] in the SLLD program at Holly Hills. On May 31, 1989, [redacted] again signed a "Placement in Special Program" form, indicating she would not give her consent for [redacted] placement in SLLD Lab at Holly Hills.

27. The District has offered to continue [redacted] in a program in her home school, Greenwood, with the increased amount of time of LD services, or to transport her to a program at Holly Hills that would be primarily self-contained with some interaction with non-handicapped students.

28. In either placement, transportation to the schools is provided by the District. At Greenwood, [redacted] rides a bus with regular education students. At Holly Hills, it was testified by Dr. Reed, that she might ride buses with regular students or might be riding buses that contained only handicapped students. It was developed by testimony that the classrooms for special education students at Holly Hills are not in the same building with non-handicapped students. The classes are in modular buildings that are close to the regular school buildings. Students in special education in Holly Hills are provided access to lunch room, recess, and where appropriate, other activities with the regular non-handicapped students.

29. The SLLD program at Holly Hills is housed in two modular units setting outside the main building. These are divided into two classes - one class consists of students, ages from just turned six to just turned nine years of age. The other class that is taught by Charlotte Nelson, has one student eight years of age and runs through the 12-year age level. It was testified that if [redacted] went to the Holly Hills program this would be the program she would enter. The witness, Charlotte Nelson, testified that a student transferring into her class may come in for a 20-day diagnostic period and would come with the existing I.E.P. After they had been in the class for a period of time, up to 20 days, it was suggested an I.E.P. covering their needs would be developed through a Staffing. The witness further testified that in the current year at this time she has six students in her class with one aide. Last year when [redacted] visited her class she had 12. She also said she generally had between 11 and 12, and might have as high as 13 for a short period of time, with a teacher and aide ratio giving a teacher or aide 6 to 1 ratio. She further testified that last year when [redacted] visited, she had two children in the mental retardation range with I.Q.'s of 60-70, probably six in the range of I.Q. 70-90. The balance would be in the average range up to 110 I.Q. She also testified that she had reading levels from first to fourth grade, and others in a math level from first grade to sixth grade. This witness testified that she was much more comfortable in the mobil units, because the prior year her class had been in the building in the end where the first, second and third graders were, and she felt uncomfortable having her "big kids" with the "little kids". She now feels she is closer to the regular fourth, fifth and sixth grade wing of the school. She also testified that last year she had 12 kids, two girls and ten boys. One of the girls was one of the mentally retarded students. However, she emphasized she was a very high functioning student, who is currently functioning in third to fourth grade. The other "young lady is probably a little below average but not in retarded range with her individual learning deficits." She also testified that she had two students that were very distractive, one with Tourette's Syndrome, who made "funny little noises, talking sounds and had uncontrollable

jerkings." The other, a boy identified as J, had behavioral problems. He was disruptive in that he talked a lot and the other students would ask him to be quiet. She testified that J is now in a program for the behaviorally, disordered child. There was no dispute in the testimony given by this witness by either party.

30. a. [redacted]s parents testified that they were disappointed with the progress that [redacted] was making at the public school, and during the summer found a private school. In September, 1989, the parents enrolled [redacted] in Havern Center School, which is a private school specializing in the teaching of learning disabled students. The School indicates that they do not accept non-categorical placement of students and they do not have non-handicapped students on their campus although many of their learning disabled students are considered minimally mentally handicapped.

b. Testimony from staff at the Havern Center School indicated that they would expect two to three years of intense work with [redacted] before she was ready to return to mainstream situation in the public school. They also indicated that they would expect most of their students to graduate from high school with a regular degree and many of them go on to schools of higher learning.

31. a. The District testified that they believed [redacted] was making appropriate progress in her current placement at Greenwood. Respondent testified, through witnesses, that [redacted] was making slow but steady progress.

b. The District continued to recommend Holly Hills as appropriate for [redacted] during the Hearing.

32. a. At some point in late Summer of 1989, the Petitioners, through counsel, contacted the District and requested reimbursement of [redacted] tuition and transportation at Havern Center.

b. In a letter dated September 11, 1989, the District responded to Petitioner's counsel denying the request, as follows:

> "......Because the District can provide an appropriate program for [redacted] we can neither recommend nor fund a private placement. Accordingly, we must deny [redacted] request that the District pay [redacted] tuition and transportation expenses at Havern.
>
> If [redacted] wish to reconsider a placement with us, we are more than happy to work with the family

further to insure appropriate placement and program within the Cherry Creek District."

c. In a letter dated October 9, 1989, Petitioners' counsel wrote to Mr. Jim Huge, Superintendent of Cherry Creek School District, requesting a Due Process Hearing.

d. Under date of October 20, 1989, Dr. Richard Reed, Director of Pupil Services, responded to [redacted] acknowledging their request for a due process hearing, and included a packet of material advising them of their rights under the due process procedure.

ISSUES

In the Pre-Hearing Conference held in December, 1989, the Hearing Officer determined that the major issue in this case revolved around furnishing a Free Appropriate Public Education, and that issues set forth by the Petitioners involving procedures were secondary to the major issue. The Petitioners objected during the Pre-Hearing Conference and later by a motion requesting a clarification of issues feeling that other issues were also involved in this case. The Hearing Officer determined that while the additional issues would be brought forth by the Petitioners, they were still issues that determined if a free appropriate public education was provided to [redacted]. However, since the Petitioner is requesting relief in the form of monetary reimbursement in addition to the FAPE issue, certain issues are set forth as separate items.

The Petitioners raises the following, as issues in this case:

1. Did Cherry Creek Public School District No. 5 provide and does it now offer to provide [redacted] a free appropriate public education, in the least restrictive environment, supported by a written I.E.P. consisting of educational instruction specifically designed to meet her unique needs, and supported by such related services necessary to permit her to benefit educationally?

2. Did the Administrative Unit comply with the procedures mandated in EAHCA and the CDE State Plan?

3. Petitioners claims that Respondent failed to provide a FAPE for the following reasons:

   A. Evaluation:

      1. Portions of the initial evaluation was incomplete and/or was invalid.

      2. Evaluations did not include complete required scope of evaluating.

      3. Evaluations did not include evaluating for probable emotional needs.

      4. Right to independent evaluation was not provided to parents.

   B. The I.E.P.s were not properly prepared and executed:

      1. Amount of time for each class of service, including regular education, was not shown.

2. Progress and achievement were not properly shown.

3. Goals and objectives were not specific.

4. Extended school year for summer program was not discussed or included on an I.E.P.

5. Placement was not made in accordance with the consensus of the staffing team.

C. Rights and procedures were not followed.

1. Parents were not advised of due process procedures.

2. Proper notice of meetings and staffings was not given and not in a timely manner.

D. Least restrictive environment requirements were violated:

1. Placement in least restrictive environment was offered a continuum of services was not offered.

2. Placement recommended by the Administrative Unit does not meet lease restrictive environment criteria.

4. The Administrative Unit recommended tutoring for the Petitioner but did not offer to pay for the services or advise the parents that Administrative Unit could pay for services. Petitioners are entitled to reimbursement for tutoring they provided for [redacted] to benefit her educationally. (The Petitioners did not state a dollar amount they are requesting for this reimbursement.)

5. The Administrative Unit recommended counseling and therapy so the petitioner could benefit educationally, but did not advise the parents that such services could be provided by the Administrative Unit or that Administrative Unit could pay for such services. Petitioners are entitled to reimbursement for therapy/counseling they received and paid for in order to provide [redacted] educational benefit. (Petitioners did not state a dollar amount they are requesting for this reimbursement.)

6. The Petitioners are entitled to reimbursement for tuition, transportation and related costs for placing [redacted]

[redacted] in a private school, Havern Center, for the school year 1989-90. (The Petitioners did not state the dollar amount they are requesting for relief in this issue.)

7. The Administrative Unit be directed to develop and sign an I.E.P. placing [redacted] in Havern Center at public expense for school year 1989-90, 1990-91 and to continue until such time as there is a consensus of the staffing team that [redacted] is ready to return to public school.

8. Petitioners are entitled to reimbursement for attorney fees they incurred pursuant to this hearing.

DISCUSSIONS AND FINDINGS

A. Evaluation:

Reference: EAHCA Section 1412 (5)(C). All children residing in the state who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated....... .

34 CFR Section 300.531
34 CFR Section 300.532
1 CCR 301-8, 220-R-3.00
CDE State Plan Section V. D Assessment.

1. The Petitioners claims that in the initial evaluation in 1985, one of the tests was either inaccurate or invalid. Petitioner refers to the WISC-R given by school psychologist, Marilyn Anderson (See Fact No.4a). Her report showed [redacted] had a full scale I.Q. of 98, placing her in the average range. Petitioner claimed that this apparent inaccuracy of a test was never corrected and contributed to improper programming in the ensuing school years. While there was not substantial evidence to demonstrate that this one test may have influenced future programming for [redacted], the psychologist's report speaks for the possibility of the test not being valid.

2. Petitioners claim that the evaluations and assessments in 1985, did not cover the complete range of testing as required under 1 CCR 301-8, 220-R-3.03 (5)(a) which gives a mandatory assessments necessary for a suspected handicapped condition of perceptual/communicative (learning disabled) as vision/hearing, educational, developmental history, adaptive behavior, and speech/language. This section also recommends a health history and a psychological assessment. In reviewing the documentation submitted into evidence consisting of a series of school personnel reports made during the period of September and October, 1985, the IHO believes that the examinations and assessments necessary to meet requirements of EAHCA and of 1 CCR, referenced above, were completed, including a psychological report and a report on health services.

3. Petitioners claim that evaluations did not include consideration of probable emotional needs. Examining evidence that was submitted, the IHO finds that the psychologist, the social worker, the speech/language evaluator, and the regular classroom teacher were all aware of probable emotional needs and made recommendations concerning these needs in their reports. Whether the assessments intellectually and emotionally were accurate and led to appropriate programs and services, is discussed below.

In the fall of 1988, [redacted] was again evaluated prior to the triennial review. Evaluations were conducted by the same type of evaluating team, although not necessarily by the same personnel as some had left the system or moved on to other positions. At this point in time, the school psychologist was Robert Robbins. He again used the WISC-R or Wechsler Scale to arrive at an intellectual assessment. He found a full scale value of I.Q. at 84. This psychologist also noted that [redacted] was "a child with highly variable cognitive functioning." (See Fact No. 21a). The result and significance of other tests used at the 1988 triennial will be discussed further on in the report. However, it should be noted that in this 3-year evaluation/assessment, there was still considerable concern about [redacted] "self-esteem, motivation, and peer relationships." Overall the claim of the Petitioners, based on the evaluation issues, is a claim that [redacted] was either inappropriately evaluated or certain areas were not evaluated, and therefore, she was not receiving adequate programming to meet her needs to allow her to benefit educationally. At no time while [redacted] was in Greenwood did the parents request an independent evaluation, and the only outside evaluation she received was for visual therapy. These two issues will be more fully explored under the item, Rights and Procedures. To examine this issue for appropriate evaluation, the IHO has turned to testimony provided by a number of witnesses at the hearing. Catherine Lines is a District employee and works as an area coordinator of Pupil Services. She is a certified school psychologist, a licensed practicing psychologist and a certified special education teacher, with endorsement in learning disabilities and behavioral development. This witness stated that in reviewing the documents and evaluation procedures, it was her testimony that [redacted] handicapping condition was visual-motor integration and auditory discrimination. Since there had been considerable discussion about the problem [redacted] was having at Greenwood and having to move back and forth between classes and teachers so much, how this affected her self-esteem this witness testified that in her professional opinion, "Changing, or back and forth movement, in itself would not be the soul cause of low self-esteem or academic failure. It may be a contributing factor for a child who is not successful in school. It may be a contributing factor to her learning as optimally as she potentially could. Some children's change affects more than others."

The Petitioners called, as an expert witness, Helen Weiss. Helen presented, in both verbal testimony and a written resume, evidence that she has nearly 40 years of experience in teaching and education primarily with learning disabled students. She had worked as a private instructor and a private consultant for a number of school districts. She and her husband, Martin Weiss, had been widely published of literature and procedures in educating learning disabled children. She also presented herself as widely experienced in the evaluation in education of children with dyslexia. Her husband, Martin, was also presented as an expert witness. Mrs. Weiss testified that along with her husband, she had evaluated [redacted] over a period of three hours prior to having reviewed [redacted] school records. Mrs. Weiss disagreed substantially with portions of the evaluation that had been performed for [redacted]. She stressed that she was not questioning the competency of the evaluators, but their perspective and the guidelines that were used in their evaluation. This witness testified that she administered a verbal expressive I.Q. since to readminister the Wechsler would disqualify as it can not be administered in a two-year period. Her assessment of the results of her test, was that [redacted] had a mental age of 12 years which was a high average for her, and testified that she felt that [redacted] I.Q. would probably be at about 105, a significant discrepancy in what she found on the school test as to visual and motor integration skills. Her further testimony was, after explaining some of the results of some of the tests she gets, that "It immediately tells us this is a characteristic of a child with dyslexia and specific learning disabilities, which is a very specific kind of program for that child." She went on to testify concerning the tests she and her husband had given, "We felt that she was a normal aptitude child, perhaps higher, if she had not felt so poorly about herself, and having her self-esteem so damaged and also had she been specifically placed in a program so designed for specific language disabilities rather than a more generic type of program."

Barbara Robinson testified for the Respondent. She had been [redacted] LD teacher in first, second and third grades and one month in the fourth grade. She testified that from the diagnostic examination she had given [redacted] in the fall of 1985 and again in 1988, "It indicates that once again she was still encountering difficulties in the reading process. They used the test, Woodcock Reading Mastery and also did another test that would indicate there were reading difficulties and also written language still remained in educational need for her." Later in her testimony she stated, when asked about [redacted] progress over the approximate three year period, "I saw her making slow but steady progress in the reading area. The measurements show going approximately four months growth each year, so that was a slow sort of rate of progress."

Connie Miller was called to testify for the Respondent. She is a Speech/Language Pathologist for the District. She testified that in her opinion [redacted] does have a speech/language disorder. She referred to it as "difficulty with auditory discrimination skills, her sound blending skills," and she asked about emotional factors and if they were known to other teachers she responded that they were all concerned about them and, "We are all seeing the same thing, lack of eye contact, twisting of the hair, playing with fingers." She was asked the question, "Was she ever referred for any emotional evaluation or addressing these concerns by any of you.?" A. "Not that I'm aware of."

Robert Robbins is the District school psychologist that tested [redacted] in the fall of 1988 for the triennial review. Asked the following question by the Respondent: "In the areas in which based on the tests which you performed, is there a discrepancy between [redacted] intellectual ability and the achievement that she has had?" A. "Based on the obtained I.Q. of 86, no, there is not." Q. "That number is not necessarily representative of all of [redacted] strengths, is that correct?" A. "That's true. It never describes her very low areas nor describes her strengths. This describes some average between them." Q. "What is the District standard for a discrepancy that qualifies a child for learning disabled?" A. "I understand it to be a 40 percent discrepancy between ability and academic functioning." Q. "And based on the testing at the triennial, it was less than a 40 percent discrepancy?" A. "Relative to the I.Q. score, yes." Q. "Do you believe there may be other factors that have contributed to [redacted] problem other than a learning disability?" A. "Yes. Behavioral issues that include avoidant behaviors, a lack of availability, difficulty connecting and taking risks around academic kinds of areas. Certainly attention problems were a large problem for her."

Carol Colburn, a District regular education teacher and had taught [redacted] reading in fourth grade. She testified concerning the results of the Iowa Basic Skills test that was given [redacted] in the fall of 1988, the results of which were received in the winter or spring of 1989. In this test, showed [redacted] in the lower one percentile. She was asked if she thinks that reflects [redacted] ability, her answer was, "Well, that was my problem right then, not necessarily." She was asked, "What do you think of her ability to think? Do you think she's average at least in thinking ability?" A. "Yes." Q. "Better than average?" A. "I saw spikes in [redacted] ability and they were in the language/arts area. What she heard made sense to her, and that seemed to be a strength for her."

Dr. Nancy Dixon was called by the Respondent as an expert witness. She is a Educational Clinician Diagnostician at the J.F.K Child Development Center. Her title is Chief of Education. She testified that she had reviewed the documents of [redacted]. In cross-examination, she was asked about opinion of the tests, particularly the I.Q. test given by the psychologist. She said that she did not give a lot of weight to those tests in her opinion of where [redacted] should be placed for education. Her quote was, "In fact, her's was a minor element because the intelligent testing - in my professional opinion - both of those intelligent measures are, what shall I say, inconclusive."

Janet Kester was called by the Petitioners since she is a teacher at Havern Center. She has a degree in psychology and a masters degree in special education of emotional disturbed children, and has been teaching learning disabled children at Havern for eight years. She is currently one of [redacted] teachers at the Havern Center. She had reviewed the records of [redacted] testings and skills levels while at Greenwood. Comments, in part, were as follows: "As I look at [redacted] first grade test scores, she given five tests, or parts of five tests, and she consistently showed lower skills in auditory perceptual areas. She shows the auditory vocabulary as being at the low range of normal. She shows questionable auditory memory when you get into the long pieces of information, and she specifically shows her sound blending skills are low. At first grade level it is difficult to tell whether this is indicative of speech/language problem in so much as listening and speaking skills, or whether this is indicative of reading and writing skills. Therefore, I cannot question placement in a speech/language program in first grade. I think there is every justification for doing that. There would also be justification for not doing that. This is a clinical judgement - it's a judgement by what kind of time the therapist has. I think, as you look at the triennial report, you see the same sort of differences. You've said that her language, her listening and speaking skills remain in the normal range.......In 1985, with better WISC-R scores at that time, showed her verbal performance to be considerably better than her performance scores, in other words, her verbal was at 104 or 105. The WISC-R was at 91. This is not indicative of a language disturbed child......In 1988, you again see what [redacted] shows as her listening and speaking skills are in the normal range. Her reading skills are trailing terribly behind, and at that point the speech/language therapist recommended distinction/speech/language therapy. What I would say is that as you went along in that 3-year period, one should be able to see sooner than fourth grade that there was a widening gap there, i.e., speech/language is remaining in the normal, but the reading continues to fall below, and that a more appropriate placement is in a reading program rather than a speech/language program. That is my analysis."

From the testimony of the witnesses and the evidence that was submitted at this hearing, two major issues arise. First, the District's own psychological evaluation of [redacted] in 1985, and again in 1988, varied widely. Federal and State regulations require that evaluations be performed by competent and knowledgeable persons. This is not to attack the competency of the psychologist that performed the evaluation in 1985. However, if she felt that her tests were invalid, some corrective effort should have been made at that time. It appears to the IHO that her evaluation findings played a major part in the decisions of the other personnel in designing programs for [redacted]. The District had an obligation to review the initial findings and either substantiate them or correct them. The second major concern is the dramatic contrast between the opinions of District personnel and individuals who evaluated [redacted] after she was placed in Havern Center. To determine whether one or another of the evaluators and assessors are more competent, more knowledgeable, or more experienced than another is not the role of the hearing officer, but the fact that all of the people testifying about their evaluations, assessments and observations of [redacted] possessed credible backgrounds and substantial amount of experience, leads the hearing officer to believe that in order to get a consensus of opinion about [redacted] intellectual ability and learning disability and find a ground the parents can accept to develop an I.E.P., an independent evaluation will be required, it will be so ordered by the hearing officer.

4. Right to independent evaluation was not given to the parents.

Reference: EAHCA 1415. Procedural safeguards,(b) Required Procedures: (1) The procedures required by this section shall include, but shall not be limited to,

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or
(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

34CFR Section 300.503, Independent Educational Evaluation:

a. The parents of a handicapped child have the rights under this part to obtain an independent educational evaluation of a child, subjects to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents on request information about where an independent educational evaluation may be obtained.

CDE State Plan, Section VI Procedural Safeguards:

B. For purposes of this Plan written prior notice shall mean a written notice which must be given to parents of a handicapped child each time an action is proposed.

a. The written notice must include:

(1) A full explanation of all the procedural safeguards available to the parents as specified in this Plan.

b. The notice must be:

(3) Provide in a timely manner to insure that the parents have an opportunity to agree or object to the action proposed or refused.

3. Independent evaluation may be obtained and parents/guardians shall be informed of the following:

a. Upon request, information about where an independent educational evaluation may be obtained.

b. That the parents have the right to an independent educational evaluation at public expense if they disagree with the results of an evaluation and paid by the public agency.

The Petitioners claim that the parents were not appropriately advised of the opportunity to receive an independent evaluation.

On a "Permission for Assessment" notice that [redacted] signed in September 13, 1985, Item 3 states, "If you disagree with the assessment made you may secure an independent evaluation at the school's expense." There is nothing presented at this hearing to indicate that the District had provided written notice regarding independent evaluation, other than the notice in September 13, 1985. [redacted] testified that while she signed the Permission Statement, as discussed in other portions of this document, she was not aware that the right to an independent evaluation existed, or that it existed beyond the purposes of securing an independent evaluation for the initial evaluation/assessment. Both parents testified that they were not aware of their rights to an independent evaluation during the time they were concerned about the programming of [redacted]. As the IHO examined the documents presented into evidence, he found no further direct notices had been provided to the Petitioners of their procedural rights including the right to an independent evaluation. Respondent's claim that they have met the requirements of EAHCA in issuing notice in 1985. Requirements to provide notice at any time a change in placement is recommended, proposed, or refused, is stated quite clearly in the above references. In particularly the State Plan clearly states that such notice, including the right to an independent evaluation, should be presented to the parents in a timely manner. In the CDE State Plan under Section VI Procedural Safeguards, C 3 the definition is - "timely manner" means that a prior notice is received no later than 10 school days prior to any action. The subject of proper notification in a timely manner is discussed in more detail hereinafter. It is worth noting that with the detail that EAHCA and 34CFR stress to assure procedural rights are guaranteed for the parents and the very clear definition in the CDE State Plan of the 10-day notice, there is no intention that a notice should be carried over for up to or more than three years. The IHO finds in favor of the Petitioners on this issue and finds that the District did not provide notice to the parents of their right to an independent evaluation and did not provide such notice in a reasonable time.

B. The I.E.P.s were not properly prepared and executed:

Reference: EAHCA, Section 1401 (19). The term "Individualized Education Program" means a written statement for each handicapped child developed in any meeting by representatives of the local education agency, or in an intermediate educational unit, who shall be qualified to provide, or supervise the provision, specially designated instructions to meet the unique needs of handicapped children, the teacher, the parents or guardian of such a child, and whenever appropriate, such child, which statement shall include (A) A statement of the present levels of educational performance of each child, (B) A statement of annual goals, including short term instructional objectives, (C) A statement of specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular education programs, (D) The projected date for initiation and anticipated duration of such services and, (E) Appropriate objective criteria and evaluation procedures and schedules for determining, at least on an annual basis, whether instructional objectives are being achieved.

EAHCA, Section 1414, (a)(5): Provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an Individualized Educational Program for each handicapped child at the beginning of each school year, and will then review and, if appropriate, revise its provisions periodically, but not less than annually.

CDE State Plan, Section V, E2:

See Fact No. 7, 8, 10, 11, 14, 16, 17, 18, 19, 21, 24, 25, 26.

Petitioners claim the I.E.P.s were not properly prepared and executed for the following reasons:

The first three items under this issue, will be considered in one discussion: 1) Amount of time for each class of service, including regular education, was not shown, 2) Progress and achievement was not properly shown, and 3) Goals and objectives were not specific.

[redacted] was found eligible for special education in September-October, 1985. At the initial staffing, an I.E.P. Phase I page, I.E.P. Phase II pages, and one I.E.P. Service Plan, Phase III page, were drawn up. Part of the confusion on behalf of the Petitioners and in the beginning on behalf of the IHO, was that the written I.E.P. pages were submitted to the Petitioners and to the IHO as single sheets and were not attached or presented in chronological order. This made it appear in a number of cases that an I.E.P. may have been unsigned or undated or not contain complete information. Barbara Robinson, the LD teacher and Dr. Reed, Director of Pupil Services, in testimony, explained the District's method of creating and issuing I.E.P.s and explained how the process worked. When the I.E.P. pages were assembled in the correct and appropriate order, we can begin to review for the above three items by tracking the actual I.E.P. sections, from first grade through fourth grade. The initial I.E.P. Phase I page, as indicated in Fact No. 8, contains the eligibility statement, strengths and weaknesses of [redacted]. The Phase II pages indicate the service that she will be receiving in regular education and special education, long-term goals and what is listed as short-term objectives. The service plan for that same year was issued on October 18. This service plan is the series of pages that carries through from year to year. October 18, 1985 Service Plan, shows the goals as set forth in Fact No. 8, that the resource personnel will be an LD teacher, and the time-line would be 40 minutes, four times a week, from September, 1985 to May, 1986. It also lists the evaluation criteria that will be used to measure [redacted] progress. In May, 1986, this same sheet is reviewed again and the progress based on the testing from the evaluation criteria is noted. It appears to the IHO that this initial I.E.P. process may meet the criteria as set forth above, however, in describing the District's methods, Dr. Reed testified that they considered the I.E.P., the programs that's developed at the initial staffing, and that the Phase IIIs are not actually I.E.P.s, but merely service plan sheets. While this may fit the need of the District in tracking their special education students, it does not technically meet the requirements in EAHCA, Section 1414(a)(5) requiring the I.E.P. to be reviewed annually. It appears to the IHO that the entire I.E.P. sheets should be reviewed and re-written on an annual basis.

On May 23, 1986, a meeting was held. It is not clear from the testimony if this would be called an I.E.P. meeting, or a staffing to review the progress of the previous year and write a Service Plan for the next year. The first sheet of this Service Plan written in 1986, and to be reviewed in May, 1987, was apparently submitted to the meeting already typed out and contained many of the same goals as the previous Plan. The parent of [redacted], [redacted], signed this Plan. [redacted] testified during the hearing, that in many of the meetings she attended involving the I.E.P. program, she felt overwhelmed by the number of school personnel in attendance and that she could not fully understand all of the discussions that went on around the programming. Part of this may have been due to the fact she was handed a sheet to review and sign that already had been made up. The May 23, 1986, Service Plan for time with the LD teacher was shown as five hours a week. Speech and languages added to this Plan and a second sheet of the Service Plan was handwritten showing the goals and objectives for the speech/language specialist. There was no breakdown of the time of five hours per week that [redacted] was to receive under this Service Plan. It is not indicated whether this five hours will be divided by the LD teacher and the speech/language, or if they are to use the time jointly. On the Service Plan, written up by the speech/language specialist, the time-line is shown only as from 5/86 to 5/87.

In May, 1987, the same sheets are reviewed again and the progress in terms of testing in accordance with the evaluation criteria, is noted on the sheets. It shows only the end results and does show what [redacted] level was at the beginning of the year. At the May, 1987, meeting, Service Plan was written for the following year. At this time, again, the plans apparently submitted at the meeting already typed out. Both [redacted] and [redacted] attended this meeting and signed the Plan.

In the May, 19, 1988 meeting, these same sheets were reviewed again and the progress that [redacted] made with the LD teacher, as a result of the evaluation criteria, was listed on the Service Plan. Again, the starting point was not shown, only the final results. Under speech/language there was shown both where [redacted] was at the beginning of the year and where she had achieved at the end of the year. Speech/language did not show anything under time-line except that this service would be from 5/87 to 5/88. On the Service Plan showing [redacted] time with the LD teacher, the time-line shows 1-1/2 hours each day.

In September, 1988, (See Fact No.21a), the triennial review was held. Dr. Reed explained in testimony that this is the first time the total I.E.P. would be re-written, based on evaluations made for the triennial review. Again, the IHO notices that this is not in total compliance with EAHCA requirements. However, there does not seem to be a major problem as long as the I.E.P.'s total sheets are produced for each staffing. The triennial review again shows [redacted] eligible for special education. These Service Plan sheets that were developed in 1988 were reviewed in May, 1989, again some of the sheets were submitted already typed out. By this time, [redacted] had already been admitted to the CBS Program (See Fact No. 17). As noted in the Fact Sheets, an I.E.P. for the CBS Program was not written until February, 1988, and does not show the actual time that [redacted] will receive this program. It is not clear from the documentation submitted that this might be combined with other programs, although testimony from the Respondent indicated that [redacted] would receive both direct services and consultation services with other teachers from the CBS specialists. The Service Plans that were reviewed in May, 1989 and which were prepared for use the following year, do no show the amount of time [redacted] will be spending with either

LD teach, speech/language teacher, or CBS specialist. On a new sheet drawn up for the LD teacher only long-term goals are shown, such as, [redacted] will demonstrate one year growth in overall reading level and [redacted] will show growth in written language and cursive letter writing. [redacted] will maintain 90 percent accuracy for 2-3 levels and 50 percent for 4-5 levels. Evaluation criteria in the form of tests to be used is shown. The Service Plan sheets had been drawn up in 1988 and were used for the 1988-89 years. The achievement shown on this one sheet shows the beginning level and at the end the accomplishment level.

It is also noted by the IHO, that in a meeting in March, 1989, (See Fact No. 25) a schedule was issued showing that [redacted] was to receive a total of 12 hours and 25 minutes in the learning disabled program. There are no I.E.P. sheets or Service Plans submitted into evidence to show that this was ever supported by an I.E.P. Nothing in the way of I.E.P.s or other written evidence, presented at the hearing, gives the time [redacted] would be in regular education programs or what she would be accomplishing in regular education. Witnesses for the Petitioners, [redacted] Wall, and Helen Weiss, both brought in as expert witnesses, and both with substantial amounts of times in the teaching system and familiar with I.E.P.s, testified that in their opinions the I.E.P. presented at this hearing did not provide enough information to determine the achievement levels of [redacted]. They had reviewed this documentation prior to the hearing and both stated that they could not determine her time in program and how much she had accomplished during the year. Catherine Lines, a witness for the Respondent, when questioned under cross-examination, stated that she could not tell the amount of time [redacted] had in certain programs, and relation to the overall format of the I.E.P.s was asked, Q. "Does that meet professional standards." A. "You know, I think I would like to say here, that this particular form did not always lend itself to specifically documenting that, the actual amount of time."

The IHO, having reviewed for himself, the I.E.P. documents and tracked them through from first grade through fourth grade, finds that the documents while they appear to serve the District's needs and supply necessary information to the District personnel, they do not meet the requirements as set forth in EAHCA 1401(19), 1414(a)(5), 34CFR 300.346. The following are obvious shortcomings. The time in special education and regular education is not shown and divided among the programs. Progress is not shown in terms of where [redacted] was a the beginning of the year and where she was at the end of the year, (with a few exceptions). The goals and objectives, while written out, and meaningful to the LD and speech/language teacher would not be meaningful to a parent who was not informed about educational "jargon." I do find, however, that since one or both parents attended the I.E.P. meetings, they would have had opportunity to ask questions and request additional information. The real concern here is not the format of the I.E.P. or the method by which it was developed, but the content of the I.E.P. The IHO finds that the errors committed on the I.E.P.s and the lack of information on the I.E.P. in of itself is not enough of a default on the part of the District to find that this entered into the primary issue of providing [redacted] a FAPE. This issue will, however, enter into the final order of the IHO.

4. Petitioners claim that the District did not provide extended school year for summer program and it was not discussed or included on any I.E.P.

As noted in Fact No. 19, [redacted] attended a summer program, High Plains, in the summer of 1988. [redacted] father, [redacted], testified that they always tried to provide [redacted] some form of summer school. The only document entered into evidence at the hearing to indicate that the District provided summer services, was one report titled, "Cherry Creek Summer Evaluation Form, Language Arts/Reading." It was never made clear to the IHO the involvement of this summer program for [redacted]. If the District provided any summer program or extended year program, there was never an I.E.P. issued to cover same. A special concern of the IHO, is that there is nothing on any of the annual reviews in May of each year, to indicate that summer programming was discussed and offered to [redacted] if appropriate. The value of a summer program for [redacted], or for that matter other handicapped students, has a wide variance in opinion between the Petitioners' witnesses and the Respondent's witnesses. Dr. Reed, District's Director of Pupil Services, testified in cross-examination, as follows: Q. "Is there any risk that [redacted], over the summer, would not maintain this momentum that was gathering?" A. "I'm not aware of any risk that this would be." Q. "Do learning disabled children sometimes lose ground over the summer?" A. "I think all the children come into school in September having lost some ground, but it's not - not considered a part of a process to start - we back up a touch and start it again. We wouldn't begin September 1 the left, you know, June 6, or whatever the last day of school is, but typically it - within a short period of time we have kids back up to par and moving along where they were previously." Q. "And it's no different for learning disabled than it is for regular ed kids." A. "It varies, but it's typically not difficult for us to get learning disabled kids back up to par within a reasonable amount of time after school starts." Q. ".....Would that worry you that she would lose ground over the summer." A. "No, I think that summer is almost a right of passage for kids, that's its for other things. I think that we can drive kids crazy with homework and summer school, and letting them be kids, too, is a pretty healthy thing to do." Q. "You do not believe that services over the summer would have been appropriate, especially in reading." A. "Appropriate, for me, would be if the parents feel they would want to do something - would it be needed or appropriate are two different things."

Testimony by Janet Kester, the teacher in Havern Center with over 20 years experience in teaching and training for disabled children, testified as follows: Q. "What about tutoring, or summer programs. Are those necessary for [redacted] at this time?" A. "Summer programs would be absolutely helpful. Tutoring is not helpful at the moment." Q. "Summer programs - why would that help?" A. "In her case, if she's on a roll, I'd hate to stop it, let's keep it going. And, also, so that whatever benefits that she gets during the year, that she doesn't lose." Q. "Is that a common problem with LD kids?" A. "Yes." Q. "Summer programs are beneficial generally for them?" A. "Yes." Q. "Because they regress over the summer academically?" A. "Yes."

There are a number of examples in case law where summer program or extended school year was ordered by the courts for handicapped children. Most of these decisions were based on the foundation presented in Rowley, "According to the definitions contained in the Act, a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." In Crawford v. Pittman, 708 F. 2d 1028 (5th CIR. 1983). The court held ".......rigid rules such as 180-days limitations violate the EAHCA's procedural demand that each child receives individual consideration, and also the substantive requirement that each child receive some benefit from his education." In GARC v. Daniel, 716 F. 2d 1565 (11th CIR. 1983), the court held that because the State of Georgia failed to follow the procedures set forth in the EAHCA, and also failed to develop adequate individualized educational programs for the children, which might have included an extension of the school year beyond 180-days.

There are a number of cases that demonstrate that in order to meet the unique needs of a handicapped child so that child might benefit educationally an extended school year or services beyond 180-days should be considered.

While the CDE State Plan does not address the extended school year directly in the Plan, other than reference to the mandate to provide FAPE, the Colorado Department of Education has published guidelines for extended school year. These guidelines are set forth herein:

Guidelines
Extended School Year

It is the recommendation of the Colorado Department of Education, pursuant to state and federal rules and regulations, that students identified as being handicapped be eligible to receive educational services in excess of the number of days of educational services available to non-handicapped students.

All students identified as being handicapped should be considered as eligible for extended school year services (ESY). However, the determination of which handicapped students will receive ESY services shall be made by the local administrative unit through the staffing committee. That committee shall be comprised of no less than the Director of Special Education or designee, the child's primary service provider, the service provider(s) of the service(s) in question, the child's parent or advocate and the child, if appropriate. Whichever services(s), under ESY, is offered to the student, shall be offered at no cost to the student or parent(s). For students residing at the regional centers, state hospitals, Colorado School for the Deaf and the Blind, (C.S.D.B.), residential child care facilities or group homes and receiving educational services out of district, the determination of eligibility for ESY services lies with the school district of jurisdiction.

The eligibility of a handicapped student for ESY services may be considered at any meeting called to discuss the individualized educational plan (IEP) of a student. However, ESY should be discussed at the annual review of the student's IEP. For those students about whom a suspicion of the need for an ESY exists reviews should be scheduled early enough to allow for planning on the part of the parent, the administrative unit and if necessary the agency providing the educational and educationally related services.

Administrative Guidelines

Purpose:

The purpose of extended school year services is not to learn or to enhance new skills, but to prevent serious regression of previously learned skills. In addition, the purpose is to provide only special education and special education related services. Extended school year services are not intended to replace or be synonymous with those services typically referred to as summer school.

Eligibility:

Extended school year services should be provided when it is determined from historical data, documented clinical

> or class room observation, or other objective evidence that the regression of already learned skills will reach a point that the time spent in recoupment of learned skills detracts from the teaching of new skills. Significant regression generally occurs in the area of motor development, adaptive behavior and/or functional skills. Data for determining regression may be collected following lengthy holidays or any other extended absences from school.
>
> The IEP is the guiding document for service provision in the ESY. Strong consideration should be given to the development of a separate IEP document for ESY services. This may be accomplished with the addition of a single page attached to IEP in effect. The length of the ESY as well as the intensity of the service(s) provided should be determined on an individual basis by the staffing committee.
>
> Every effort should be made to provide ESY services in the least restrictive environment. However, program options, i.e., resource room, itinerant teacher, etc., for the provision of ESY services may be limited. It may also occur, owing to circumstances of geography, availability of personnel, and other factors that the least restrictive environment requirement may be impacted. Additionally, owing to the same circumstances, certification standards held for services providers may be reconsidered.
>
> Local administrative units may not use budgetary constraints to disallow the provision of ESY services. The Department will establish a reimbursement procedure for ESY services.

The IHO finds that the District has committed a major violation of the EAHCA rules and regulations in not evaluating [redacted] for summer program. The IHO makes no determination if she is eligible to receive extended school year services. This is a determination that should be made using the guidelines set forth above. However, there is no question that ESY services should be considered at the annual review or as suggested several months before the end of school.

5. The Petitioners claimed that placement was not made in accordance with the consensus of the staffing team. In examining this issue, we refer to 1CCR 301-8 220-R-4.0 PLACEMENT. Placement of a child in a special education program or service, an assignment as specific staff responsibility shall be made......with consideration of the desire of the parents.

CDE State Plan, Section V, E.2.b. procedures.....at a minimum however the unit shall b. required at the staffing/I.E.P. committee reached its decision by consensus.

This issue has posed a paradoxical situation for both the Administrative Unit and the parents. [redacted], the parent of [redacted], testified that she had felt "pressured" to transfer [redacted] to the placement at Holly Hills, even prior to the 11/6/87 meeting. She testified that she had continually been encouraged, verbally, to consider that placement. November 6, 1987 she was presented with a Placement in Special Program Form (See Fact No. 16) recommending placement in Holly Hills, and at that time [redacted] refused the placement. A similar form was presented to the parents again May 31, 1989, (See Fact No. 26) and again the parents refused the placement. Dr. Guthals, Principal at Greenwood, testified that he recommended [redacted] be placed in Holly Hills and felt it was the best placement for her. Dr. Richard Reed, Director of Pupil Services, also testified he believed this was the best placement. It appeared to the IHO that the members of [redacted] staffing committee from sometime in early 1987, had been encouraging the placement of [redacted] in Holly Hills, had recommended this placement and that honestly, sincerely believed [redacted] would benefit educationally if placed at Holly Hills. However, when the parents refused this placement, the District " acquiesced to the parents wishes and began developing a program at Greenwood." When we looked at the CDE State Plan for a definition in Section V. F. 5. "Consensus" means that the collective opinion and general agreement, after discussion, which should confer commitment to the decision reached. It is clear to the IHO that the consensus and the decision of the District staff at Greenwood was that [redacted] should be placed in the SLIC program at Holly Hills. Even with that strong feeling, the District did not ask for a hearing to over-rule the parents' decision not to accept the placement at Holly Hills.

The IHO does not find this lack of consensus a serious violation of procedures or not a violation at all, since it is commendable of the District to make every effort to meet the parents' desires. However, this does bring up a concern in my mind, if having made the decision [redacted] would be better off at Holly Hills, will they maintain the required commitment to provide educational benefits in another setting. While the IHO has concerns about the lack of a consensus in the final staffing, I do not find any serious violation on the part of the District in this matter.

C. The Petitioners claim that rights and procedures were not followed, as follows:

1. Parents were not advised of due process procedures. Reference: EAHCA Section 1415,(b) Required Procedures:

(1) The procedures required by this section shall include, but shall not be limited to,

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change

the identification, evaluation, or educational placement of the child for the provision of a free appropriate public education of the child;

(D) Procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian.....of all procedures available pursuant to this section and (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education of such child.

(2) Whenever a complaint has been received under paragraph (1) of this sub-section, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the state..... .

Reference: CDE State Plan, Section VI, E.1. For the purpose of this plan, written prior notice shall mean a written notice which must be given to the parents of a handicapped child each time an action is proposed.

a. The written notice must include:

(1) A full explanation of all the procedural safeguards available to the parents and specified in this plan.

b. The notice must be:

(3) Provided in a timely manner to insure that the parents have an opportunity to agree or object to the action proposed or refused.

The Respondent's claim that proper notice of availability of a due process hearing was provided the parents with the initial consent statement (See Fact No. 3). This was in September, 1985. Further when consideration of the form "Placement in Special Programs," was presented to the parents, this form contains a statement "Parents have the right to appeal to the Director of Special Education if they do not agree with the recommendation of the staffing committee." The Respondent contends that this constitutes adequate notice of due process rights. The Petitioners testified that they were unaware of their due process rights as they moved along through the process of developing special education for [redacted] The Petitioners admit that their signatures do exist on the documents as put forth in the finding of facts. Both [redacted] and [redacted] are intelligent, college educated, professional people who a person would expect to view and understand documents placed before them. Barbara Robinson, the LD teacher for the District, testified that on the initial assessment paper, she was explaining it to [redacted] [redacted] and [redacted] told her she didn't need to read all of it to her as she was familiar with the document. Barbara Robinson testified that she insisted on presenting it to [redacted] anyway. [redacted] testified that she did not remember that conversation.

What is evident to the IHO in this instance is that the only written notice of the parents rights to a due process hearing was extended in 1985. The references above, particularly to the State Plan, clearly states that such notice is to be provided the parents in a timely manner. Under Section (D)(i), procedural safeguards of the State Plan, C Definitions No. 3, the plan defines: "timely manner" means that prior notice is received no later than 10 school days prior to any action. While most of the notices that are to be exchanged with the parents will refer to meeting dates and the action to take place at such meetings, it is clear that this also extends to providing on an on-going basis notice to the parents of their procedural rights including the rights to a due process hearing. This essentially the same issue as was discussed under evaluation issues, the notification of the right to an independent evaluation.

While the Petitioners testified that they were unaware of their rights for a due process hearing and believed that the assessment notice in 1985 pertained only to that assessment, they did not indicate if they would have taken advantage of a due process hearing prior to 1989, had they been aware of this procedure. The records show that after enrolling their child in Havern Center, in contact with counsel, they did request the school to write an IEP placing [redacted] at Havern, and when the school refused to do this, they requested reimbursement for the tuition and ultimately a due process hearing. Since this action did not occur until the Summer of 1989, when they came in contact with an attorney knowledgeable about the due process system, it appears they may have requested this action earlier had they been aware of this procedural right. It is found by the IHO that the District has not followed the mandated procedure in both EAHCA and the CDE State Plan. The IHO will take this violation into consideration when writing ~~his final~~ order.

2. Petitioners claim that proper notice of meetings and staffings was not given and not in a timely manner.

This issue relates essentially to the same issues as above as to the giving of notice. There were entered into evidence copies of a series of notices that were sent to the parents advising them of specific staffing or IEP meetings. Further, all of the documents that pertain to this case where the parents were required to be involved, one or both parents attended the meetings and signed the documents. The Petitioners presented no testimony or evidence to indicate that they missed or were excluded from a meeting for lack of notification. While some notices that may have been required for certain meetings are not in the records, the IHO finds no reason to believe or find that the District violated this procedure for giving notice of upcoming meetings.

D. Petitioners claim that least restrictive environment requirements were violated.

1 & 2. Petitioners claim placement in least restrictive environment as a continuum of service was not offered and the placement recommended by the Administrative Unit does not meet least restrictive environment criteria.

Reference: 1412 (5). The state has established (A) procedural safeguards as required by Section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children including children in public or private institutions or other care facilities are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when nature or severity of the handicap is such that education in regular classes with the use of supplementary aid and services cannot be achieved satisfactorily.

Reference: 34CFR Section 300.550, Section 300.551, Section 300.552, 300.553.

Reference: CDE State Plan, Section X Least Restrictive Environment.

As set forth above, there was a consensus of the District staff at least as early as the Fall of 1987 continuing through 1988 and up until the annual review meeting in 1989, that [redacted] should be placed in the SLLD program in Holly Hills in order for her to receive educational benefits. Respondent testimony from Dr. Reed, Director of Pupil Services, the Principal at Greenwood, and teachers and support services personnel directly involved with [redacted] verifies that they believe that the program at Holly Hills would be the best one to serve her educational needs. As indicated in Fact No. 16, 26, the parents have consistently refused to accept this placement. The parents based their rejection of the Holly Hills placement on 1) the class categorical or multiple categorical placement of students in the program that range from mildly mental retarded to average. 2) The age range in the program that [redacted] would attend is from eight years old to 12 years old. 3) The facilities are not in the least restrictive environment setting. The Respondent contends that the teachers involved with the SLLD program at Holly Hills can offer [redacted] more than she would receive in other programs because they are dual certified, i.e., they are certified in a specialty of language as well as learning disabilities. That the size of the program allows more one-on-one environment and small group educational opportunities. The Administration also admits there would be involvement with other students who are non-handicapped. Both Petitioners and Respondent presented witnesses who had viewed this program at Holly Hills.

The Petitioners brought in as expert witnesses, Catherine Wall, who has over 24-years experience teaching in the learning disabilities field, and who had visited the Holly Hills program. Catherine Wall testified that on her visit she found the class that [redacted] would attend, if assigned there, in a separate building, there were "six or seven children in the room, one teacher and one aide. There was no group work being done." Part of her testimony as follows: "I guess what I didn't see bothered me more than anything, was there were no role models. There was no one in the room that a newcomer coming into that room would look at and say, here I have something to look toward, that this person will be better than I am and I can get something from them. It was just kind of flat." She further testified, "There were carrels and that I guess its okay, I don't really like them but because it isolates the kids, but it does give them a little privacy." Referring to this witnesses' recommendation to [redacted], not to place [redacted] in Holly Hills, she was asked, "Have you had occasion to regret your advice to [redacted] and like them to visit?" A. "No. It was reinforced." Q. "Do you see any strengths in this program?" A. "There are strengths for some children in that program." Q. "Do you see weaknesses in the program?" A. "Well as I perceive the program, the business of children relating to other children, children having role models, just the general integration of those children with the rest of the school, I thought it was unfortunate that that particular class had to be in an outside building - out of the building. For me that took on a big connotation, it means this is what we really think of you." The witness was then asked if she had an occasion to visit Havern Center, which she replied, she did. Asked to describe the program at Havern Center, she said there were 13 or 14 children there. There were two teachers and an aide. There was an atmosphere, there was a non-critical, non-judgmental, non-labeling atmosphere. She explained that the environment of the program, it was part of a large building, it was warm -physically warm, emotionally warm. There was a feeling of caring, not just teacher to child, but child to child. Under cross-examination this witness testified to the following: Q. "Let's make sure. Do you believe a self-contained classroom would meet the need of any special education child. You've expressed the belief that it was not appropriate for [redacted] Can you see it meeting the needs of any child?" A. "Of some children, yes." Q. "So you would actually place some children in self-contained classes." A. "Yes." Q. "Even Holly Hills?" A. "Well I think of a child can be placed in a self-contained room like that, their disability has to be so profound that they cannot function in the regular classroom." Q. "And reserving your right to say you don't like the trailer situation for any, did you find that appropriate for any child? They call it a mobile unit - away from the regular building." A. "The mobile unit gives out a big message. It says you're not part of us." Q. "And would you find that a problem for any special needs child?" A. "Yes."

Martin Weiss, an expert witness for the Petitioners, was testified in response to the following: Q. "You're familiar with placement situations?" A. "Sure." Q. "Is harm a legitimate concern?" A. "Absolutely." Q. "In your professional experience have you come across any examples of harmful placement and the impact on a particular child?" A. "Yes, where the student is not placed in the class that consists of students with like or similar problems, but where a student is placed in a group with students that have vastly different problems. It's very definitely a harmful situation."

Catherine Lines, a District supervisor of Pupil Placement Services, testified as follows: Q. "In what ways does the SLLD program (meaning the program at Holly Hills) include the requirements and objectives to take into account LRE giving it as a self-contained program?" A. "We're very conscientious of that with our self-contained programs, because at Cherry Creek we truly believe we want the children educated in the home school if at all possible. I will say that what is incorporated in the SLLD program is we have a program for each geographic area. In other words, the SLLD program services children within the west area, so it is geographically close to home or as close to home as it can be?" Q. "In response to a question you saw the Holly Hills' program as being a well-suited environment which to deliver [redacted] individual programmatic needs?" A. "Yes." Responding to a question about the fact that the parents at the meeting in May, 1989, had rejected the Holly Hills placement and that they were beginning to develop another placement for [redacted], the witness was asked, "Now if you felt did you feel at that time that the Holly Hills program was still superior for [redacted]?" A. "Yes, for [redacted]." Q. "I want to know is why didn't the school insist on it (the Holly Hills program) if was so much better? Why didn't the school do something to override the parents' objection? Why did the school always agree?" A. "I would say at that meeting what was reviewed was the schedule and basically

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the program had been put together for [redacted] based on the March concerns It involved the entire team at Greenwood, including the regular classroom personnel, special education personnel, administrative personnel.......The school felt it was manageable and that they were meeting her needs in doing some things. They were seeing some changes in her, in some ways she was responding. At that point we felt, hey, we have something here, let's go with it. Although I think the optimal place I professionally feel is the Holly Hills program." Q. "So you felt at the time it was certainly appropriate to go with the parents' wishes and continue her in that program?" A. "Yes." Later on in her testimony in a cross-examination, responding to a question, "What harm would there be to [redacted] referring to a placement at Holly Hills?" A. "I think when we look at changing a child from their home school there is always a change factor. It is a big change. You're making a decision that their needs are not being met as optimally as you would choose in the home school. In other words, you feel they could benefit from another environment which means a change in school."

Barbara Robinson testified that she was the LD teacher for [redacted] from first grade to the beginning of fourth grade when she worked for the District. She testified that she felt [redacted] needs could best be met at Holly Hills and she had visited the program. She testified about the situation at Holly Hills. "I made the recommendation for placement. I felt they could better meet her needs. There was an LD teach there who was also dually certified in speech/language. There was a smaller teacher/pupil ratio. She could receive more intense services there. I thought it was a program that would better help her to learn.

In March, 1989, at a special meeting called to review [redacted] program, the District agreed to retain her at Greenwood and to increase the time she would have with the LD program to 12 hours, 25 minutes (See Fact No. 23). However, as pointed out hereinabove, there is no record of an I.E.P. being written at that time to show both the time, the program, and the curriculum that [redacted] was to receive for the balance of the school year and for the following year. At the annual review meeting held May 31, 1989, [redacted] previous years work and accomplishments were reviewed; however, there is nothing to indicate that a new I.E.P. was written at that time to show the new program that was to be in effect the next year. EAHCA regulations definitely and specifically require that an I.E.P. be formulated whenever there is to be a change in program and placement. The parents signed the annual review and the proposed Service Plan for the year 1989/90, but testified later they had no way of being assured that [redacted] was going to receive programming that would meet her educational needs.

It is also observed by the IHO that while the school continued to stress the placement of [redacted] in Holly Hills program they never offered an I.E.P. designating the program she would receive. Therefore, it is understandable that the parents would not be aware of what her program would be if she transferred to Holly Hills.

The question here for the IHO to decide, is would a transfer of Cathy to the Holly Hills program provide her a FAPE that would give her an opportunity to benefit educationally in the least restrictive environment possible. In reviewing the program at Holly Hills, the IHO relies on testimony of the experts and the teachers from Holly Hills that suggest the best qualified teachers to provide the type of program [redacted] requires are currently at the Holly Hills program. Dr. Reed testified that in his opinion these were the best in the District's system to provide this type of program. It also has been testified that [redacted] needs require smaller groups and smaller settings, and less moving around from classroom to classroom. This would all be provided at the Holly Hills placement. The IHO must also consider, as brought forth in documentation and testimony (See Facts No. 28, 29), that the Holly Hills program is, 1) Housed in mobile units that are not part of the school building that is occupied by students that are not handicapped, 2) the programs have an age range from 8-12 years of age, and 3) they contain cross-categorical placements. An issue that stands out during the progress of this hearing, is the Administrative Unit's contention that they can provide a program for [redacted] in which she will benefit educationally, but that it can only be provided, or at least best be provided, in the Holly Hills placement. Even though the District agreed to continue her program at Greenwood with extended hours in the LD lab, at the same meeting they continued to urge her placement at Holly Hills. The parents, supported by testimony of experts provided by the Petitioners, objected to the placement at Holly Hills for the reasons noted. Referring to the EAHCA regulations and 34CFR descriptions, along with the State Plan, it is clear that, 1) Placement of a student like [redacted] in a building removed from the other building is essentially placing her in a separate campus. A case was brought to the attention of the hearing officer, listed in 1988-89 EHLR Dec. 401:101 (no citation given). In discussing the continuum of alternative placements found a school districts placement "operated solely as a segregated placement for handicapped students even though the Center was attached to a regular Junior High School attended by both regular and special education students." In this case the IHO agrees with that observation. Even though part of her day would be taken up with "main streaming" in the non-handicapped students, she would still be in an isolated setting. This is contrary to the dictates of least restrictive environment. There are times when a student can and ~~perhaps should~~ be removed from the regular school's setting. These issues revolve around the student that is either a danger to other students or a danger to him/herself. Clearly [redacted] is not a danger to other students. If she is a danger to herself, it is only in the respect that it would further damage her self-esteem and emotional balance. This is one of the major reasons that the parents have resisted having her placed at Holly Hills. The other two issues are quit definitely set out in the regulations that students, whenever possible, should be educated with age appropriate peers. The issue of having [redacted] in with students with other disabilities would in of itself not be such a serious matter if it was not for her very fragile emotional stability. (Placing [redacted] in a classroom with a mixed category of handicapped students may not in itself be inappropriate if they were essentially of or above her functioning level.) However, testimony indicated that last year one of the students was a severely behavior problem student and had to be removed for that reason. Dr. Reed, as well as others, testified that the issue of mixed categorical and cross-categorical placement is of much debate. A number of the witness that know [redacted], testified that such a situation would be inappropriate for her placement. In this respect we rely heavily on the parents since, as was pointed out in Rowley and Burlington cases, a great deal of emphasis was put on the involvement of parents in developing the placements including, if necessary, the appointment of surrogate parents to be sure that children are properly represented. With that much emphasis on representation we must surely place as much emphasis on the opinion and desires of the parents. The District took this into consideration when, even against their own recommendations, they offered to place [redacted] at Greenwood. The difficulty, as mentioned before, was the District produced neither an I.E.P. for Greenwood or an I.E.P. for the Holly Hills placement. Since the District maintains that it can provide the type of teaching techniques that are required for [redacted], and similar students, the IHO must draw the conclusion that these programs, teachers, and facilities could be provided in her home school as the next step in an alternative of a continuum of services. The establishment of four such centers in the District, as was testified to by the Respondent, indicates that the services are not being designed to meet the students needs, but rather the students are being sent to where the services exist. The court finds reason to support this concept. In Roncker on behalf of Roncker v. Walter, 700 F. 2d 1058 (1983), the court finds:

> "The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically

> superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate. Campbell v. Talladega City Bd. of Education, 518 F.Supp. 47, 55 (N.D.Ala.1981). In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. See Age v. Bullitt County Schools, 673 F.2d 141, 145 (6th Cir.1982). Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. The provision of such alternative placements benefits all handicapped children."

On this basis, the IHO finds for the Petitioners that the District did not offer placement in the least restrictive environment, and did not offer a continuum of services in the least restrictive environment.

4. The Administrative Unit recommended tutoring for the Petitioner but did not offer to pay for the services or advise the parents that the Administrative Unit could pay for such services.

Reference: EAHCA, Section 1401(a)(17). The term "Related Services," means transportation and such developmental corrective and such other support services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only), as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

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The Hearing Officer is aware that there are a number of court cases where the Administrative Unit was directed to pay for various related services that were necessary for the student to receive educational benefits.

In order to determine if the District in this case is obligated to pay for tutoring services the following must be established: 1) Did the services actually occur? 2) Were they directed or requested by the District? 3) Were they necessary for [redacted] to receive educational benefit?

The social worker's report, prepared for the triennial staffing in September, 1988, refers to the fact that over the summer [redacted] had been receiving tutoring (See Fact No. 21d). [redacted], [redacted] father, testified that. "We employed a tutor every summer to help [redacted] and to help [redacted] ([redacted] older brother), for both children.......We provided summer school classes for both children and mostly it was remedial for [redacted], although we tried intermix a fun class with the remedial class to try to keep her interest up. Additionally, we involved her in many sport activities to try to improve her coordination and fine motor skills."

Petitioners claim the services should be paid for by the District. The Respondent denies that the District requested [redacted] to have tutoring in the summer, or suggested to the [redacted] that if tutoring was available the District would pay for it.

While the tutoring [redacted] received may have benefited her and may have enhanced and improved her chances to benefit educationally, the Petitioners who are carrying the burden of proof on this issue, did not offer a preponderance of evidence to demonstrate that the tutoring was requested by the District. That the effects of the tutoring would provide educational benefit, and did not state what the tutoring consisted of. Without anything more to relate to than the testimony that [redacted] was provided tutoring, the IHO cannot find that the District is responsible, and therefore, my finding is to deny the Petitioners their claim that they should be reimbursed for costs for tutoring.

5. The Administrative Unit recommended counseling and therapy so the Petitioner could benefit educationally, but did not advise the parents that such services could be provided by the Administrative Unit or the Administrative Unit could pay for such services.

Reference: The same EAHCA references that applied for the tutoring, would apply in this case. It is quite clearly stated that counseling services, psychological services and "other supportive services," when required to assist the handicapped child to benefit from special education are the responsibility of the Administrative Unit. Again, there are number of court cases that would support this view. However we, again, must establish if these services occurred, the reason the Petitioner was engaged in such services, and if the District recommended or directed the Petitioner to gain these services in order for [redacted] to benefit educationally.

There is evidence that [redacted] visited Dr. Lynn Haverstein, for optometric vision therapy (See Fact No. 13). Also, [redacted] testified to the effect that [redacted] had been engaged in such therapy for some period of time. The length of this therapy and the nature of the treatment were not described. Neither testimony nor documentation was submitted to demonstrate what this therapy was intended to accomplish, and whether it was a medical need or connected to [redacted]s education. Petitioners' claim that counseling or mental health therapy was also secured and was necessary for [redacted] to benefit educationally is involved primarily in a recommendation by a social worker report in 1985, recommending that the family consider family therapy. And, there was a follow-up note where the social worker stated again that he encouraged [redacted] to have this therapy (See Facts No. 9). In 1988, a social worker report indicates that [redacted], [redacted] and [redacted] older brother, had attended Mental Health Center during the 1987/88 year (See Fact No. 15). [redacted] had refused to attend the therapy/counseling services. [redacted] testified during the hearing that he did not object to the counseling as such, but he felt that it was going to have an adverse effect on [redacted] since she was already undergoing serious self-esteem problems. Although there was much discussion during testimony about the referral for counseling and therapy by the District social worker, it was not clearly established that the reason or need for this outside mental health counseling/therapy was to assist [redacted] to benefit educationally. The Petitioners brought forth no evidence to demonstrate that the counseling [redacted] received and/or the family received was centered around her educational needs. It is the finding of the IHO that lacking any other evidence or testimony the District is not responsible to pay for the counseling/therapy services for either the visual or mental health services the [redacted] received.

C. The Petitioners are entitled to reimbursement for tuition and transportation for placing [redacted] in a private school, Havern Center, for the school year 1989/90 (The Petitioners did not state the dollar amount they are requesting for relief of this issue).

During the Summer of 1989, the Petitioners located a private school, Havern Center, that specializes in the education of learning disabled students. The [redacted] testified that an opening became available and [redacted] was enrolled at Havern Center in September, 1989, in the fifth grade. Petitioners further claimed that Havern Center meets [redacted] specialized and individual needs and that she is currently progressing in that environment. They further claimed that the instruction at Havern Center is assisting [redacted] to overcome her behavioral problems, which consist primarily of avoidance of tasks and demonstration of a low self-esteem. The Petitioners claimed that because the District did not provide and did not demonstrate they could offer to provide [redacted] a FAPE they are entitled to reimbursement for tuition and transportation costs at Havern Center.

Respondent denies the allegations of the Petitioners and claim that the District offered [redacted] two appropriate placements that could meet her unique needs and provide [redacted] educational benefit. The District proposed a transfer to the SLLD program at Holly Hills, or an expanded LD program at Greenwood Elementary School. The Respondent further claimed the parents unilaterally placed their daughter in a private school without the consent and approval of the District, and are therefore no entitled to reimbursement for those expenses.

Reference: EAHCA 1413(a)(4)......Set forth policies and procedures to assure -

(A) that to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried under this sub-chapter, by providing for such children in special education and related services.

(B) that handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individual educational program as required by this sub-chapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency......

34CFR 300.341 Private Schools and Facilities. The state educational agencies shall insure that an individualized educational program developed and implemented for each handicapped child who:

> (1) is placed in or referred to a private school or facility by a public agency.

CDE State Plan, Section XIII, Placement in Private Schools by the Administrative Unit or other public agencies.

D.3. When an handicapped child offered a free appropriate public education in the local administrative unit or in a public agency and the parents waive that opportunity in favor of a private school placement, the administrative unit shall not be required to pay for the child's placement at the private school or facility.

> a. Should the parents of an handicapped child claim that an appropriate program does not exist within the local administrative unit, and the local administrative unit disagrees, that disagreement and the question of who remains financial responsibility will be a matter to which a due process procedures apply.

Garrick v. Curwensville Area Public School District. 699F. Supp. 705 (M.D.P.A.1987). The following are excerpts from this case decided by the U. S. District Court, M.D. Penn. In this case the courts relied heavily upon the Rowley suit for guidance. The following are pertinent sections:

> "The question is not whether in the courts lay opinion a program recommended by the district offers the greatest possible benefits to Garrick or whether the private placement desired by the parents is preferable to the district's program. The determination is simply whether Garrick is receiving sufficient educational benefits to satisfy the requirements of the Act.
>
> "A placement which may be considered better for academic reasons may not be appropriate because of the failure to provide mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not of course any basis for not following the Act's mandate."
>
> "In referring to 20 USC Section 1412(5). This indicates a clear congressional preference for mainstreaming of handicapped students and furtherance of that policy the Federal regulations requires each public agency to establish a continuum of alternate placements giving priority to the least restrictive environment."

This issue and the issue following are the backdrop for the entire reason for this hearing. In order to find a determination on these issues, the IHO briefly summarizes the findings on the previous issues.

A. Evaluation. While the IHO found that the District's evaluation process did cover the entire range of evaluations required, it was obvious that their evaluations were inconsistent and possibly invalid. It was also found that the Petitioners had not been properly advised of their rights for an independent evaluation.

B. I.E.P.s. While the preparation of the I.E.P.s did not follow the mandates of EAHCA and the State Plan, the major problems with the I.E.P.s were that they were not constructed in such a manner as to inform the parents and other interested parties of [redacted] program and progress.

C. Rights and Procedures. The IHO found that the District did violate the Petitioners' rights by not informing them in two major areas, the right to due process, and more importantly, the right to an independent evaluation.

D. Least Restrictive Environment. Here the IHO found the recommended placement in Holly Hills violated the least restrictive environment and the other option of placement in Greenwood neither supported by an I.E.P. or offered the program that would allow [redacted] to benefit educationally, since that program as testified to by the Respondent, was being offered at Holly Hills. Issues 4 and 5 do not enter into the decision on the discussion at hand.

The entire EAHCA and related regulations, including the State Plan, put great emphasis on the participation of the parents in developing the I.E.P. and thus the educational future of their child. This is emphasized in detail for us in the Rowley case. Just as the intent is to have procedures that guarantee involvement by the parents, it may surely follow that these same procedures are to insure, not only that the parents participate in formulating or approving a program, but their knowledge and insight to their child's welfare and educational needs are as important or more important as professionals that are involved in planning the program. In this vein, the IHO has put a great deal reliance on the parents' testimony that [redacted] had a severe, almost dangerous, emotional condition and a severe problem with low self-esteem. This was reinforced by testimony of those people who met and evaluated [redacted]. According to the parents' testimony they were moved to action in the Summer of 1989, on reviewing the basic Iowa Test scores where [redacted] scored in the low 1-percentile, on the fact that her reading achievement in four years had only progressed to something between a 2-3 grade level, that math which at one time been her strong point had begun to fail, while at the same time she seemed to be doing very well in non-academic subjects, such as P.E., music and art. The IHO did not put a great deal of faith in the I.Q. testing by the school psychologist since not only the Petitioners' witnesses but the Respondent's witnesses testified that they observed in a number of instances a possible or potentially higher I.Q. and performance level. The Respondent has demonstrated to the IHO that none of their actions were done in bad faith, and in fact in their own mind, they believed they were offering [redacted] two alternatives, either of which would allow her to benefit educationally. The IHO has taken into consideration the request by the Respondent's counsel to consider allowing a certain amount of the burden of proof to rest on the Respondent particularly in dealing with procedural matters. While the IHO had allowed the Petitioners to go forward with the burden of proof, he still considered and evaluated all areas where the Respondent had the opportunity to present both with documentation and witnesses proof of their position, or defense of the allegation by the Petitioners.

In many of the areas where the IHO finds the Respondent deficient, the IHO is not considering these severe enough to find they caused [redacted] not to receive a FAPE. However, certain violations the IHO cannot overlook in making a decision on this issue. The most serious in a procedural matter was a failure to advise the parents and encourage them to exercise their right to an independent evaluation. Another serious violation was a failure to involve extended school year in the development of [redacted] I.E.P.s. While this may or may not have had an effect on her receiving educational benefit, it is very probable when you take the word of some of the witnesses that she regressed enough over the summer from lack of appropriate programming to cause recurring delays in her education when she returned to school. Since the program at Greenwood that [redacted] had been involved in was not producing educational results which was evidenced by the fact that in four years she actually had not achieved in the very basic educational field. As covered hereinabove, the District offered to extend the LD time at Greenwood but failed to draft a definite I.E.P. that would show how services would be provided - including the "superior" services available elsewhere in the system (Holly Hills). It is also the finding of the IHO that the District failed to offer [redacted] a FAPE in the least restrictive environment supported by an I.E.P. which would allow her to benefit her educationally. For that reason, the IHO finds in favor of the Petitioners and will order the Administrative Unit to pay the tuition and transportation cost for [redacted] at Havern Center for the school year 1989/90.

7. The Administrative Unit be directed to develop and sign an I.E.P. placing [redacted] in Havern Center at public expense for school year 1989/90, 1990/91 and to continue until such time there is a consensus of the staffing team that [redacted] is ready to return to public school.

The background for deciding this issue is the same as the proceeding issue. The IHO however finds a different resolution here. Since the Administrative Unit is entitled to write an I.E.P. placing [redacted] either at Havern Center for the school year 1990/91 and beyond, the Administrative Unit would also have the opportunity to write an I.E.P. - subject to certain conditions - returning [redacted] to the public school system. Therefore, in resolving this issue I refer to my order and directive hereinafter.

8. Petitioners are entitled to reimbursement for attorney fees incurred pursuant to this hearing.

Refer to order covering this issue below.

Decision and Order of the Impartial Hearing Officer in the matter of [redacted] v. Cherry Creek Public School District No. 5, State of Colorado.

1. Petitioners are entitled to reimbursement for tuition and transportation costs for [redacted] at Havern Center in the school year 1989/90, and such costs will be reimbursed to the Petitioners by the Cherry Creek Public School District No. 5. In the event the parties cannot agree on the amount of reimbursement, a due process hearing will be convened to set the costs.

2. The parties are directed to arrange for an independent and impartial evaluation/assessment for [redacted], to be conducted at public expense paid for by the Cherry Creek Public School District No. 5. The independent evaluation/assessment team is to be selected by mutual agreement of both parties, which shall include but not limited to, evaluation of [redacted] to determine her needs and recommended programming in the areas of vision/hearing, educational assessment, developmental history, adaptive behavior, including special attention to emotional needs, health history, vision assessment, speech and language assessment, physiological assessment, and any other assessment as deemed necessary by either party.

3. On completion of the evaluation/assessment and receipt of her records, the District shall arrange for and convene a staffing in accordance with EAHCA procedures, and develop by mutual consent of both parties an I.E.P. for [redacted] for the school year 1990/91, including consideration of summer programming for 1990/91. Both parties shall include at the staffing such personnel or outside parties they think will help and benefit the staffing committee.

4. If at the staffing/I.E.P. meeting the District proposes to re-enroll [redacted] in the public schools, the District shall show that they can provide a program to meet the recommendations of the independent evaluation team, and do so by proposing a program in the school that [redacted] would attend if she were not handicapped. Such proposal must include related services and support including such support services that are available in other schools in the District, which would allow [redacted] to achieve educational benefit in the least restrictive environment.

5. Should the Cherry Creek Public School District No. 5 refuse to participate in availing [redacted] of an independent evaluation/assessment or should they refuse to participate in an I.E.P. staffing as set forth above, the District is thereby ordered to continue reimbursing the Petitioners for tuition and transportation expenses of [redacted] at Havern Center until such time as she is staffed back into the public schools.

6. Should the Petitioners refuse to participate in an independent evaluation/assessment for [redacted] or should they refuse to participate or accept a placement recommended by consensus of the staffing committee (which includes members of the independent evaluation team) the Petitioners shall give up their right to any future tuition or transportation expenses after the end of the 1989/90 school year.

7. (Refer to Issue No. 8) Clearly it is not within the authority of the IHO to award attorney fees. This is a matter that must be pursued through the courts as dictated in EAHCA regulations. However, the IHO does recommend that the Petitioners are entitled to recover a portion of attorney fees which matter should be settled by the courts.

8. This is the final decision of the Impartial Hearing Officer in the matter of [redacted] v. Cherry Creek Public School District No. 5, as authorized in the CDE State Plan, Section VII, Impartial Due Process Hearing.

9. This hearing was conducted under the authority of the Colorado Department of Education, in accordance with the policies set forth in the Colorado Department of Education State Plan for Fiscal Year 1989-91, Section VII "Impartial Due Process Hearing," and conducted by an Impartial Hearing Officer selected in accordance with this section.

10. In accordance with the Colorado Department of Education State Plan, Section VII.B.2.i.(1):
Either party may appeal the decision of the impartial hearing officer to the Colorado Department of Education within (30) days after receipt of decision.

Dated: in Denver Colorado
February 21, 1990

William F. Muth
WILLIAM F. MUTH
Impartial Hearing Officer

CERTIFICATE OF MAILING:

I, William F. Muth, Impartial Hearing Officer, in the matter of [redacted] v. Cherry Creek Public School District No. 5, certify that I have mailed a true and correct copy of the above findings and decisions to the below listed parties, by depositing same in the U. S. mails, certified, postage pre-paid at Denver, Colorado, on the Twenty-first Day of February, 1990.

William F. Muth
WILLIAM F. MUTH

MAILED TO:

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Case Number: S89:102

Status: State Level Review

Key Topics:
Standard of Review
Free Appropriate Public Education (FAPE)
Attorney Fees
Procedural Rights
Individualized Education Plan (IEP) Development
Least Restrictive Environment (LRE)
Extended School Year (ESY)
Clustering Services
Home School

Issues:

- Whether or not the parents were entitled to reimbursement from the district for reimbursement for child's expenses at a private facility.
- Did the district offer the child a FAPE?
- Parent's entitlement to attorney fees.
- What was the effect of procedural errors by the district?

Decision:

- IEP and process by which developed was procedurally defective.
- District did not have appropriate placement for the child.
- IHO restrictions regarding future services being provided in the home school is inappropriate.
- IHO instruction to parties to cooperate in evaluations and IEP development is appropriate.
- Parents entitled to reimbursement for tuition and transportation costs.
- Attorney fees to parents denied.

Case Number: S89:102
Cont'd

Discussion:

- Importance of procedural rights in developing a substantively satisfactory IEP.
- Responsibility of district to keep parents informed of their rights during all phases of providing a child a FAPE.
- IEP fails to document need for services that were provided.
- IEP not written in language understandable to parents.
- Must make appropriateness determination on basis of individual needs of child.
- Clustering of services is reasonable and practically results in more benefits to the student.
- Nothing in Colorado State Plan prohibits an Administrative Law Judge from awarding fees.
- Equities in case are extremely close.
- Fees requested are wholly disproportional to matters at issue.

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EDUCATION

BEFORE THE DEPARTMENT OF ADMINISTRATION
STATE OF COLORADO

CASE NO. [redacted] S89:102

DECISION UPON STATE LEVEL REVIEW

[redacted], **by her parents** [redacted], Cmr copy

Petitioner-Appellee,

v.

CHERRY CREEK SCHOOL DISTRICT NO. 5,

Respondent-Appellant.

This matter was submitted to Don P. Stimmel, Administrative Law Judge, State Department of Administration, for review of the decision of William F. Muth, impartial hearing officer, under appropriate rules and statutes. Submission was concluded on May 4, 1990. Petitioner-Appellee was represented by Elizabeth Banks Kolkoski, Attorney at Law; Respondent-Appellant School District was represented by Darryl Farrington, Banta, Hoyt, Greene & Everall, P.C., Attorneys at Law, Evergreen, Colorado.

In the text of this decision, the Administrative Law Judge uses the following abbreviations or other designations:

Designation	Meaning
A.L.J.	Administrative Law Judge
IHO	The Impartial Hearing Officer (Mr. Muth)
District	Cherry Creek School District No. 5
Greenwood	Greenwood Elementary School, Englewood, Colorado
Holly Hills	Holly Hills Elementary School, Englewood, Colorado
The Child	[redacted]
The Mother	[redacted]
The Father	[redacted]
The Parents	[redacted], collectively
Appellees	The Child and her Parents
Havern	The Havern Center, Jefferson County, Colorado
The Department or CDE	Colorado Department of Education
SEA	State Educational Agency

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LEA	Local Educational Agency
F.A.P.E.	Free Appropriate Public Education
I.E.P.	Individual Education Program
L.D.	Learning Disabled (handicapping condition)
S/L	Speech/Language (service for handicapped children)
SL/LD	Severe Language/Learning Disability and (Special Education Program)
CBS	Curriculum Behavioral Specialist
I.Q.	Intelligence Quotient
ITBS	Iowa Test of Basic Skills
Resource Room	Special Education Service in which child receives supplemental assistance from Special Education teacher to supplement regular education classes
Self-contained or S/C	Special Education Services in which student is taught subject or subjects by Special Education teacher in separate room or facility
Mainstreaming	The inclusion of handicapped child with non-handicapped children in regular classes
L.R.E.	Least Restrictive Environment
U.S.C.	United States Code
C.F.R.	Code of Federal Regulations
C.R.S.	Colorado Revised Statutes, as amended from time to time
CCR	Code of Colorado Regulations
EAHCA or the "Act"	Federal Education for all Handicapped Children Act, 20 U.S.C. Section 1401 et seq.
Federal Regulations	Regulations relating to implementation of the EAHCA, 24 C.F.R., Part 300
ECEA or the State Act	Colorado Exception of Children Education Act, C.R.S., Title 22, Article 20
State Regulations	Rules implementing the State Act, 1 CCR 301-8
The Plan	The Colorado State Plan for implementing the EAHCA
APA	Colorado Administrative Procedure Act, C.R.S., Title 24, Article 4

PROCEDURAL HISTORY

An evidentiary hearing was held before the IHO on January 2, 3, 4, 5, 6, 8, 9, 10 and 12, 1990, in the office of the District in Englewood, Colorado. The IHO issued his decision on February 21, 1990, favoring Appellees on their principal claim for relief. The District appealed to the Department on March 22, 1990, and

Appellees cross-appealed the following day challenging some unfavorable findings and conclusions of the IHO. The Department referred the matter to the Division of Administrative Hearings on March 23, 1990.

After receiving the appeal letters, the A.L.J. contacted counsel by telephone. On March 30, 1990, the A.L.J. issued a Scheduling Order providing for prompt briefing of the issue raised by the District concerning alleged bias of the IHO and subsequent briefing following determination of that issue. The A.L.J. informed counsel by telephone on April 11, 1990, that he has denied the District's request for relief on the bias issue. The A.L.J. issued a Memorandum Order to that effect on May 14, 1990. Briefing was otherwise concluded on schedule. On May 29, 1990, the A.L.J. informed counsel by telephone that due to the extent of the record and complexity of the case it would not be possible to issue a decision by the time initially contemplated, and informed them that a decision would be forthcoming as soon as practicable thereafter. Following these conversations, both counsel submitted written documentation and arguments concerning the amount of costs and the claim for attorney's fees.

STANDARD OF REVIEW

This review is part of a proceeding brought under Colorado and Federal statutes and regulations providing generally for the education of handicapped children at public expense. CDE is the Colorado SEA designated for the administration of federal funds under the Act. The Federal Regulations are phrased generally in terms of requirements with which State Plans must comply in order to qualify for funding. Thus although the specific proceeding is pursuant to the State Plan, it is primarily governed by federal law. This review is governed generally by 20 U.S.C. § 1415(c) and 34 C.F.R. § 300.510. Those provisions charge the officer conducting a state level review for the SEA with responsibility to examine the entire record, insure consistency of the proceedings with due process, seek additional evidence if necessary, afford the parties an opportunity for argument, and make an independent decision on completion of review. The standard is relatively broad and permits notation or observation of additional facts. It does not, however, alter the well-established principle that the findings of the trier of fact, who heard the evidence and observed the witnesses, are to be upheld unless clearly contrary to the evidence. The IHO was in a unique position to determine the credibility of witnesses and the weight to be given to the evidence, including the weight to be afforded expert testimony. The record here generally supports the IHO's evidentiary findings, and the A.L.J. will not distinct them. The A.L.J. has made additional findings on some issues on which supplemental material was submitted and on which the IHO made no specific findings.

The District specifically challenged the impartiality of the IHO and requested, in essence, that the A.L.J. disregard his findings and decide the appeal on the basis of the record without remand for due process hearing. The District contended that the IHO's personal circumstances and associations colored his judgment, or indicated a particular view of the Act or of what the law should be which could color his judgment. The A.L.J. determined that the IHO was entitled to the benefit of the presumption that he acted impartially, honestly and fairly. Any legal or interpretive error, whether or not stemming from the IHO's personal views, can be observed and corrected in the normal process of review. As indicated to counsel on the telephone and in the text of the ruling on the bias issue, the A.L.J. was aware of the District's claim and its bases in the process of review. There was no basis for believing that the IHO's personal circumstances or associations colored the exercise of his fact-finding function. Less than full deference to his exercise of that function would have been inappropriate. No material factual error affected the outcome of this review. The IHO's legal conclusions and ultimate determinations are discussed in that portion of this decision.

SUMMARY OF FACTS

The IHO made findings of fact, some undisputed and some based on conflicting evidence. Since those findings are supported by the evidence, they will not be disturbed. To the extent pertinent, the A.L.J. adopts and incorporates the evidentiary findings set out in pages 6-21 of the IHO's decision specifically as "Facts," as well as the additional factual conclusions included in the "Discussion and Conclusions" section on pages 25-53. The A.L.J. here summarizes and sets out facts found by the IHO, found by the A.L.J. on subsequent submission, and concerning the proceeding before the IHO, which are necessary to an understanding of the issues and of this decision. The summary is not as exhaustive as the IHO's findings and is not intended to replace those findings, which are to be regarded as among the facts of the case unless specifically noted otherwise. The summary is organized by sections but must be considered as a whole for complete understanding.

I. GENERAL BACKGROUND AND CHRONOLOGY

The Child was born in November of 1978, and was 11 years old at the times of both the hearing and this review. At the time of hearing she was a fifth grade student at Havern. She was identified as handicapped in the fall of 1985, soon after beginning the first grade at Greenwood. She received special education services within the District, funded by the EAHCA and ECEA, continually through the end of academic 1988-89, her fourth grade year. She was promoted from grade to grade each year, although her academic performance was generally below grade level and most of her grades were failing. In the summer of 1989, the Parents decided to place the Child at Havern and formally requested that the District fund that placement. The District refused but the Parents enrolled the Child at Havern anyway. She remained there throughout the 1989-90 academic year.

In the fall of 1989, the Parents began formal due process proceedings to require the District to pay for the child's placement at Havern currently and as far as necessary into the future. The IHO was selected through the normal CDE process in late November, 1989. The hearing was initially scheduled to begin on December 18 of that year, but the IHO agreed to postpone its commencement until January 2, 1990, due to unavailability of several witnesses over Christmas vacation. After a nine-day hearing and on extension of the time for issuing a decision, the IHO issued his decision. He held that Appellees (there "Petitioners") were entitled to reimbursement for tuition and transportation of the Child at Havern for 1989-90. He directed that the parties arrange for an independent and impartial evaluation of the Child, at the expense of the District, by a team selected by mutual agreement to develop an IEP for 1990-91 and subsequent years, including consideration of summer programming. The IHO set out further requirements for subsequent IEPs and sanctions for non-compliance by either party, and denied further relief which the Petitioners had sought. The District appealed and the petitioners cross-appealed, as noted in the Procedural History. Both sides claim both substantive and procedural errors.

II. THE CHILD

A. Condition

The child is physically healthy but has difficulty in both learning and behavioral areas. Through most of her school career she has been classified as L.D. handicapped. She has not been formally classified as having a behavioral disorder, although she did receive CBS services from the District to deal with behavioral issues for a period of time.

The Child's learning disability is mainly manifested in the areas of reading and mathematics, but has affected her performance in other areas as well. It is generally described as a form of dyslexia, i.e., difficulty in perceiving written material accurately. Testing indicates some difficulties with both vision and hearing, although she is in the normal range by the most widely used measures of both of those senses. She has received both visual therapy and S/L services which have included attention to perceiving and decoding symbols and distinguishing sounds. In initial testing, the Child had a verbal I.Q. of 105, performance I.Q. of 91 and full scale I.Q. of 98, placing her in the average range. A question was raised concerning the performance score due to prior practice in one of the sub-tests. In tests performed for triennial review in 1988, she was scored with a verbal I.Q. of 88, performance I.Q. of 81 and full scale I.Q. of 84. Some aspects of the testing suggested higher cognitive levels, indicating a considerable variance in ability depending on field or skill involved. Although the discrepancy between performance and verbal I.Q. scores in the 1988 testing was smaller than would normally indicate perceptual disorders, the District has continued to view the Child as L.D. and her parents agree. As of the last testing performed by the District, in May 1989, she was near or beyond two years below grade level in most of the areas tested. On ITBS administered in the fall of 1988, the Child scored in the first percentile among fourth graders.

The Child's behavior has been regarded as a problem by parents, teachers and administrators throughout much of her school career, although the problems have not reached a level of classification as behaviorally disordered. She received services from a District behavioral specialist (CBS) from the middle of third grade through the remainder of her time in the District. The principal problems affecting her academic performance have been remaining on and completing tasks, remaining attentive, and organizing her work. She has attention deficit disorder for which she has periodically taken Ritalin (methylphenidate). She was taking that medication at the end of the fourth grade year at Greenwood. Reports have not described her as disruptive and she has apparently made some friends. Both the Parents and school observers, however, have noted that she has a very low level of self-esteem and at times has not been motivated in school. Thorough review of the evidence suggests strongly that the low grades have contributed to or exacerbated her low self-esteem, and psychological evaluations indicate concern with her emotional status.

B. School History and Performance

The Child was a student at Greenwood, and advanced from grade to grade, throughout her time in the District prior to the placement of Havern. Her kindergarten teacher noted some learning problems, and she was tested and evaluated for special education shortly after beginning first grade. In all her time in special education in the District, she has attended regular classes with other students with some time in the Resource Room. The time spent in the Resource Room was generally increased from year to year. She has consistently done well in non-academic subjects such as physical education, art and music but has received grades at a failing or near-failing level in academic fields. The second grade Special Education teacher taught and graded her in reading and language and most of the grades indicated a need to improve. She spent the first semester of her third year in a second-third grade combination class, but was moved to the regular third-grade class for the second semester, apparently due primarily to the psychological effect. In fourth grade she worked on third-grade level materials in most fields but still received low marks the first semester. Early in the second semester, the Father had a conference with the Child's teacher and expressed concern about the effect of low grades on her self-esteem. The teacher had observed that the Child did not do well in test situations. The teacher did not test her, or did not base grading on test results, in the second semester. She received substantially higher marks than previously based on effort and progress. That semester the teacher noted, *inter alia*, that the Child had a high level of understanding of what she hears but difficulty with decoding, especially in reading to herself, and an ability to think and dictate in complete thoughts but difficulty writing the thoughts down.

In addition to the regular academic year, the Child had some tutoring during the summer of 1987 and attended a special summer program in the District in 1988. She spent her most recent academic year (1989-90) at Havern. That program and her progress is discussed more fully in Section IV, pages 15-16, of this decision.

III. SPECIAL EDUCATION PROVIDED AND OFFERED

A. Pertinent Services Offered by the District

1. Overall Structure and Organization

The District is located in Englewood, unincorporated Arapahoe County, or other communities in the southeastern portion of the Denver metropolitan area. It includes 25 elementary schools, five middle schools and three high schools. Each of the middle schools has a "feeder group" of four to six elementary schools. The feeder group for West Middle School consists of five elementary schools, including Greenwood and Holly Hills. Greenwood is located in Greenwood Village 1½ to 2 miles northwest of the Child's home; Holly Hills is located 3½ to 4 miles north-northwest of the Parents' home and approximately three miles north-northeast of Greenwood.

The District has special education teachers in most fields at most schools. Resource Room services are available at most or all schools. Due to budgetary constraints and an approach emphasizing mainstreaming where possible, the District "clusters" self-contained programs generally by feeder group, *i.e.*, S/C at one school serves entire feeder groups or expanded areas with other specialties spread among the schools in each group. There is one SL/LD program, for L.D. classified children with handicaps too severe to be effectively served in a Resource Room, for each feeder group. Other schools in the group have Resource Room services only for L.D. children, and S/C programs for the entire feeder group in other specialties (e.g. behavioral disorder and multiple handicapped at Greenwood for the West Middle School group).

The District also uses itinerant special education teachers, each serving several schools, for some areas. These include the CBSs, who work with children having mild behavioral difficulties which affect their school performance but are not considered severe enough for full-scale behavioral disorder services. The CBS who serves Greenwood serves five other elementary schools in the District.

2. Services Provided at Greenwood

Greenwood special education services include a full-time L.D. teacher who works in a Resource Room. It does not have an SL/LD program because it is not designated to provide that service within the feeder area. The L.D. teacher works with students in a separate classroom for a period of time designated in the I.E.P. in order to assist in the particular areas where the student is identified as needing help. The Resource Room teacher initially performs testing, if indicated, and works with each child at the level and with the methods appropriate to that child and subject. The purpose is to assist the handicapped student in subject matters in which assistance is needed to help the student deal with regular classroom material. The student goes from the regular class to the Resource Room at prearranged times. The frequency and timing of visits to the Resource Room, subjects included, methods and techniques used, and how many if any other students are present vary depending on the I.E.P. and other circumstances. The extent of participation of the resource teacher in the grading process varies with the extent of that teacher's involvement and with the progress of the children. The basic purpose of Resource Room service is to supplement the student's regular education to assist the student in benefiting from it, rather than to provide a separate program due to the handicap. Separate programs are provided when considered appropriate.

The CBS who serves Greenwood spends time, varying according the I.E.P., with students in need of the service at the students' school in a Resource Room or similar setting. The principal object of CBS services is to deal with behavioral problems which may interfere with the students' ability to benefit from education. As is the case with the Resource Room, the service is less intense than is a self-contained classroom, and is designed to supplement regular education.

3. The Holly Hills SL/LD Program

The District maintains a program at Holly Hills for students in the West Middle School area who need more intense work to cope with learning disabilities than Resource Room services can provide. The Holly Hills SL/LD program is divided into two classes by age and grade level of the children. At times material to this matter the class for older children (grades 4-6) was physically located in a modular unit outside the main building near the portion of the main building housing grades 4-6. It varied in size at material times from six to twelve or thirteen students, with one teacher and one or two teacher's aides. Students in the class normally vary in I.Q. from a mental retardation level (60-70) to above average (110), with the bulk below normal. Most of the students are dyslexic in some manner.

The teachers at Holly Hills use a variety of approaches to teach their students, including but not limited to the "Orton-Gillingham" method of teaching dyslexic students which is favored by some experts in the field. The person who taught this class at all material times holds master's degrees in both Speech Pathology and in LD education. The program is highly regarded by some experts in the field. In the spring of 1989, the student population included at least one child with significant behavioral problems and another with Tourette's syndrome, a neurological disorder which can lead to disruptive conduct.

Students in the SL/LD program at Holly Hills spend most of the school day in the S/C classroom. They are mainstreamed in regular classes in subjects, both academic and non-academic, in which they are considered capable of functioning at a comparable level to regular students and for lunch and social activities.

B. THE CHILD'S I.E.P.s AND PROGRESS

1. Notices and Format Normally Used in the District

At the time the Child's initial I.E.P. was developed, the District had and used a series of standardized forms. These included, inter alia, forms for notification of referral, notification of rights and permission for assessment; notification of staffing and recommended staffing format; parental acceptance or rejection of placement; permission to release medical information for evaluation for special education; problem identification; assessment record; and I.E.P. All these forms were used in this case, and the contents and format of some are material.

The single form for notification of referrals, notification of rights and permission for assessment included preprinted recitations of referral of the child for consideration for special education; reference to federal and state statutes and rules; a list of ten specific rights of parents under those provisions; a statement of permission for evaluation including the lists of evaluators by function; and spaces for signature of the parent or guardian and appropriate identifying information. The rights listed included, inter alia, securing an independent evaluation; granting written consent prior to placement; having the child provided "an appropriate educational program in the least restrictive environment;" prior written notice of any action affecting the placement; and impartial due process hearing on issues of disagreement.

The notice of staffing form included blanks for identifying the time and place of the staffing; a recommended format including sequence from notification to closure after recommendation; a statement that the conference will be attended by representatives or designees of the administration, teaching staff, and support services and, when appropriate, out-of-district agency professionals; a statement that "you may invite representatives of your choice;" and a statement inviting rescheduling if the time is not convenient.

The I.E.P. form had four pages, identified as Phases I through IV with the notation for Phase III (Page 4) that "this form may be used as many times as necessary." Phase I had space for personal data on the students and parents; a section called "eligibility status"; spaces for checking who attended; a notation of written summary reports to be attached to the packet; spaces for writing strengths and weaknesses of the student; and an eligibility statement that "the following handicapping condition(s) exist(s) which prevent(s) (________) from receiving an appropriate education without special educational services. . .", followed by a space for writing the appropriate information. Phase II was contained on Pages 2 and 3. Page 2 was set up in three columns, with the third headed "Special Education," and divided into four sections in a "grid" format with writing lines in each section. General areas were identified in the first column of each section, namely Curricular, Supporting Instruction and/or Training, Avocational/-Prevocational/Vocational, and Health. Although not specified by headings, it is apparent that the first column was to identify needs and the second to identify the ways in which the needs would be met by regular education. Most of Page 3 is in the same format, except that the first column is headed "A." Prioritized Educational Needs Assessment (cont)" and the other two columns headed "B." Strategy, Intervention, Personnel, and Resources-Characteristics and Service (cont.)" with the second column subheaded "Regular Education" and the third "Special Education." Approximately half the page in the first column was identified as "Environmental:" with subheadings of "Physical Adaptation," "Classroom Management" and "Social/Emotional"; two short sections were identified as "Home/School Interaction" and "Transportation". Approximately the bottom fourth of the page was a rectangular box labeled "C." Recommendations." At the top of the box the form stated "Type of Placement:" followed by an underlined list of seven alternatives beginning with "Consult." and ending with "Resid." (for "residential") and "Circle" written under the list. Immediately below was a series of lines for writing under the preprinted words "Actual Placement." Approximately the right hand third of the box was space for listing "Extent of Participation (% of time)" below which was "With Nonhandicapped Academically," "With nonhandicapped in nonacademic activities" and "With Handicapped in Special Education Programs," on separate lines with a blank on each for listing the percentages.

Phase III (on Page 4) of the I.E.P. format was headed "Service Plan". Approximately 2/3 of the page is identified as "A. Service Plan" and set up in columnar form. The first column, of almost half the width of the page, was headed "Prioritized Annual Measurable Goals (With Specific Objectives Listed)"; the next three columns were headed, respectively, "Personnel, Resources"; "Timeline"; and "Evaluation Criteria". The right hand portion of the page was blocked in bold face and headed "I.E.P. Phase IV" above the grid. In the space level with column headings for the service plan was the heading "A. Degree of Achievement (Check one)", with "Annual Review" and "Triennial Review" on separate lines underneath. Below the columnar grids on the service plan side was space headed "Participant's Approval" with spaces for date, signatures of the parent or guardian, special education teacher, administrator, student, teacher(s), and others. At the bottom of that portion was "I.E.P. Phase IV," divided into two parts, one for "Certification of Eligibility" (repeating the eligibility statement form from Page 1) and the other for "Participant Approval (Annual Review)." On the lower right hand portion below the Phase IV column was a space with listed alternatives for end-of-year status, with one of the alternatives to be circled.

The form for placement in special programs had spaces for identifying the student and parents; a statement concerning the general nature of placement in special programs; a blank for listing actual program placement; and a checkmark list of alternative statements accepting or rejecting the recommendation or indicating the desire to appeal. The bottom portion included spaces for signature of the parent, committee chairman, principal, and director of special education or designee.

In addition to the forms, the District had in use at the time of initial placement a bound handbook entitled "An Overview of Special Education, Summer - 1985", a smaller handbook of questions and answers, and a brochure entitled "Your Rights as Parents and Students in Special Education". Both 1985 booklets and an updated version of the handbook and brochure were stipulated into evidence.

2. The Child's 1985 Evaluation and Placement.

The Mother signed the first permission for assessment statement, in substantially similar form to that described above, on September 13, 1985. Assessment and evaluation included S/L, academic/perceptual testing, psychological evaluation, social work assessment, and a psychologist's report. A staffing based on these reports was held on October 3, 1985. Both Parents, the Child's first grade teacher, school nurse, social worker, psychologist, special education teacher, S/L specialist, and the principal attended. Page 1 included lists of strengths and weaknesses and the following description of handicapping condition; "delays in visual motor integration and motor speed directly interfere with achievement in reading and written language readiness (WISC-R and Woodcock Reading)". Page 2 listed four curricular needs and regular and special education strategies to meet them. Page 3 listed one additional need each in Classroom Management and Home/School Interaction, circled "Resource" for the type of placement and reiterated the description of handicapping condition. Page 4 listed five specific goals, each phrased as "TLW" statements (i.e. beginning with "the learner will"). It listed the L.D. teacher under Personnel, a timeline of September 1985 through May 1986, and service forty minutes four times per week with vertical lines indicating applicability to all goals, and identified particular tests as evaluation criteria for each. The I.E.P. was signed, under date of February 18, 1985, by the Mother, special education teacher, principal and social worker.

The Phase IV column on the first I.E.P. indicates that one of the five objectives (learning to print the alphabet with 90% accuracy) was obtained, one had "good growth", and two were evidently not obtained. The remaining goal (the first listed) of demonstrating a growth of one year in reading, decoding and comprehension had notations of varying stages of the first grade level in three different aspects of reading. Status was noted as retained for the next year in special education.

B. Plans, Achievement and Recommendations Prior to Triennial Review

Annual reviews were conducted for the Child on May 23, 1986, and again on May 15, 1987. Each resulted in issuance of new Phase III portions of the I.E.P. without either changes to or re-issuance of any of the first three pages. The service plan for second grade (1986-1987) consisted of two pages, with the first typed. Three of the typed goals were the same as in the first plan--growth of one year in reading, ability to read the "100 most frequently used words" with 100% accuracy, and growth in visual motor integration, which had been noted "remains an area of weakness" and the goal for which was changed from six months to one year. The fourth typed goal was to demonstrate growth in written language skills. Except for written language, in which the S/L teacher was also involved, all was to be delivered by the L.D. teacher and the timeline was increased to five hours per week. The second page had four handwritten goals, of improving receptive language skills, auditory perceptual skills, oral motor skills, and expressive language skills, with service for all to be delivered by the S/L specialist. Phase IV indicated that none of the pre-typed goals were reached. Receptive language skills and oral motor skills may have been reached but the other S/L goals were not. Status was listed as retained for the next year and certification for eligibility statement was the same.

Particulars of the service plan for both L.D. teacher and S/L teacher (on separate pages) were pre-typed in the 1987-88 plan. L.D. goals were the same, except visual motor integration skills listed only as improving the percentile, and the timeline delivery was listed as 1 1/2 hours each day. The S/L goals were re-worded, but covered the same general areas.

In the fall of 1987, members of the Greenwood staff involved with the Child decided to recommend more intensive services. A meeting was held on November 6, 1987, to consider the staff recommendations. The staff recommended that the Child be transferred to Holly Hills to participate in the SL/LD program. The Mother rejected the recommendation, primarily because of the belief that the Child should remain in her home school with existing acquaintances and activities. She wrote "at this time" following the printed language refusing consent to placement on the form. The staff also recommended the addition of CBS program services. The Mother did accept that recommendation and signed the form to that effect on the same day. On February 8, 1988, the Mother signed an additional Phase III I.E.P. page for behavioral goals with a timeline running through May, 1989, for services to be provided through the CBS group. No changes were made in any of the first three pages of the I.E.P. to list either behavioral goals or a need for more intensive L.D. services.

The next annual review staffing was held on May 19, 1988. The degree of achievement (Phase IV) on the third grade service plan indicated that the Child was near grade level in letter identification, a year or more below in other reading areas, and had finally completed the "100 most frequently used words" list with 94% accuracy. The other L.D. goals had not been met or the areas remained weak and the S/L goals had not entirely been met. The new Phase III page listed two pre-typed goals each for the L.D. and S/L teacher and an additional hand-printed goal for the S/L teacher. Writing the cursive alphabet was added as an L.D. goal. The 100 most frequently used words, visual-motor integration and the other specific S/L goals were deleted. The timeline column did not list any specific time per day. The IHO found that the plan involved 1 1/2 hours per day with the L.D. teacher.

The written notices for each of the annual reviews were on short forms stating when and where the annual review would take place and reciting that the Parent's signature was necessary. The forms did not contain any recitation of rights. The IHO found that the Parents were not advised of their rights, particularly those to a due process hearing and an independent evaluation. Except for the initial advisement prior to the 1985 staffing, the evidence supports this finding and the A.L.J. will not disturb it. At the times of the annual review staffings the Parents did not fully understand their rights, either to an impartial due process hearing (as opposed to review by higher level District personnel) if they disagreed with recommendations or to an independent evaluation.

C. Triennial Review and Final Staffings

The District conducted a triennial review, involving re-evaluation in all pertinent areas leading to preparation of a complete new I.E.P., in the fall of 1988. An L.D. report, based on administration and results of five separate tests, an S/L report which involved seven tests, a social work assessment, and a psychological evaluation were all performed. This testing led to the notation of lower I.Q. score (all in the 80's) which has already been noted. S/L testing indicated language skills as in the average range but the Child placed consistently below grade level in most areas on the other testing Psychological and social problems were also found. The psychological report included an expression of concern about the Child's emotional status, including significantly low self-esteem. It included a recommendation for a self-contained setting to provide necessary individualization and structure. It also suggested further assessment for possible medication for attention deficit and depression. The social worker also suggested an S/C setting.

The triennial review staffing was held on September 23, 1988. A new Page 1 for the I.E.P. was issued at that time, with some differences in the listing of weaknesses and strengths. The Eligibility Statement was worded exactly the same as in 1985. Apparently, no new Pages 2 or 3 (listing of needs, strategies, and extent of participation in regular and special education) were prepared. The Father did sign a new "Placement in Special Programs" form agreeing to continue placement in the L.D. program, itinerant behavior program, and S/L consultation at Greenwood.

During the triennial review, the staff again suggested that the Parents consider placing the Child in Holly Hills. The Parents did not agree but did agree to view the program. Sometime during that fall or the following spring, the Mother visited Holly Hills and observed a class. She noted with particular concern the presence of mentally retarded or near-retarded children and children likely to be disruptive or distracting in behavior. She was concerned that the Child would identify with mentally retarded children, at least one of whom was an acquaintance, which would in turn damage her self-esteem.

In October of 1988, the Child took the ITBS with overall scores in the first percentile. The Parents' concern increased after receiving the results of those tests. Early in 1989, the Parents contacted a member of the District School Board in an effort to obtain more time in the L.D. program for the Child. Their apparent objective was to arrange to have a more adequate program presented at Greenwood. On March 9, 1989, the Parents, the

District's Director of Pupil Placement, the Coordinator of Pupil Services for the area including Greenwood, and the Greenwood Principal met. The Holly Hills SL/LD program was again suggested, and the Mother stated her reasons for rejecting it. A special staffing was held on March 21, 1989, including the Director of Special Education and Coordinator of Pupil Services for the area. At that staffing, it was agreed to increase the Child's special education services to 12 hours and 25 minutes per week, including 9 hours 55 minutes with the L.D. teacher, one hour 30 minutes with the S/L teacher, and one hour with the CBS. No revised I.E.P. was issued to reflect this change.

Following the March 21, 1989, special staffing, a schedule for the Child beginning April 3, 1989 was prepared. A typewritten copy was supplied to the Parents. The schedule included numerous moves to and from Resource Rooms. The Parents and others have expressed concern about the potential confusion created by repeated changes, particularly including calling the Child from the classroom while other students remained.

The next annual review was held on May 31, 1989. Results noted on Phase II of the prior plan showed the Child to be approximately two years below grade level in reading (although ahead of it in letter identification), and to have fallen far short of remaining academic goals. She had met or exceeded all behavioral goals. The staff again recommended placement in the SL/LD program at Holly Hills, and the Parents again rejected it. For a second time, the Mother signed a form refusing to give consent to that placement. An I.E.P. consisting of two handwritten Page 4s was then prepared, restating with slight change three academic goals, listing consultations for S/L, and stating four behavioral goals different from those previously listed. The Father and the L.D. and S/L teachers signed the page for academic and the Mother and the CBS signed the page for behavioral goals. Thus documents purporting to be an I.E.P., to the extent of completion at annual review by the District's normal practice, were prepared and signed for the Child for 1989-90.

IV. THE HAVERN PLACEMENT

A. The School

Havern is located on South Wadsworth Boulevard in the southwest metropolitan Denver area. It is approximately 9 1/2 miles west and 2 1/2 miles north of Appellees' home. It is a substantial distance west of the district.

Havern specializes in the education of L.D. children. Most are of average or above average intelligence, but there are some on the lower end of the scale as well. It was initially founded by the Sisters of Loretto, a Catholic order, but has not had any direct connection with any church for several years. It serves children aged 5 to 13, has a small student body (60 to 65 students), with a low student/teacher ratio (approximately 4:1). Havern uses a variety of approaches for teaching L.D. children, including but not limited to the Orton-Gillingham approach. Experts called by both parties acknowledged that the program is of very high quality. The school's staff normally works with a child intensely for two to three years and expects that the child will then return to and complete regular education in the mainstream.

B. The Placement

Although they signed the I.E.P. for Greenwood for 1989-90, the Parents were dissatisfied with the Child's progress and decided during the summer to seek alternatives. There were no findings on the source of the suggestion of Havern, other facilities considered or their cost, or the factors involved in selection of Havern. Whatever the reasons, the choice was made before the beginning of the academic year and the Child was enrolled. At about the same time Appellees, through counsel, requested that the District fund the Child's costs at Havern. The District refused on the grounds that F.A.P.E. was available to the Child in the District.

C. The Child's Program and Progress at Havern.

The IHO's findings on the subject were brief, but the evidence indicated that the Child was making progress at Havern consistently with that school's expectations. The District has not contested that the Child has benefited from the program there. She is in a class of 14 students, all L.D., with a primary teacher, an assistant teacher, and an aide. The students get substantial individual attention. They are not in carrels, as is the case at Holly Hills, although carrels are available if needed. The teachers emphasize successes in the process of building self-esteem. They consider this particularly important here because of the low level of self-esteem with which the Child entered the school. The other students with which the Child interacts, although L.D., are not otherwise handicapped. Havern does not accept students who are classified as emotionally or behaviorally disturbed.

D. Costs

According to an affidavit supplied by the Parents, the 1989-90 tuition at Havern was $6,570.00. Except for families who qualify for publicly funded or assisted services, parents provide their own children's transportation. A round trip from Appellees' home is 24 to 30 miles, depending on the route chosen. The Parents claim costs of tuition, $21.30 interest on it, $100.00 deposit for 1990-91, and transportation costs for 3,210 miles by the Parents and 3,264 miles by the Child's paternal grandfather. They claim

$.50 per mile in each case as "actual cost". The Parents additionally list 107 days for themselves at $10.00 and 30 miles per day, and 68 days at $15.00 and 48 miles per day for the grandfather.

V. PROCEEDINGS BEFORE THE IHO

A. Prior to Hearing

The District sent a letter denying the Parents' request for reimbursement on September 11, 1989. On October 9, 1989, counsel for the Parents formally requested an impartial due process hearing. On October 20, 1989, the District's Superintendent of Schools replied enclosing an explanation of the process. In accordance with regular CDE procedures, the District then requested a list of available hearing officers, together with brief resumes, from the State Department. The District then eliminated one name, the Petitioners two, and the District one more from the list, leaving the person not stricken as the IHO selected. The process was completed with notification to the IHO of his selection on November 22, 1989. Pre-hearing conference was held on December 5, 1989. The initial setting and continuance are noted in the Procedural History.

Mr. Muth, the IHO selected, and a Fort Collins attorney remained on the selection list after Appellees had stricken two names. Muth's resume stated that he was a retired engineer and noted experience in engineering construction arbitration, some mediation experience, and membership in the National Writer's Club with publication of numerous articles. Educationally, the resume noted an engineering degree from the University of Colorado. It made no mention of his family or other associations. The Fort Collins attorney's resume included reference to having established a Legal Center for the Handicapped in Salt Lake City, Utah, which provided legal services in various areas including educational matters, along with other legal experience, and listed current activity including representation of towns and public authorities. The District struck the name of the Fort Collins attorney, leaving Muth as the IHO.

According to the statement of counsel for the District, he learned on the morning of the last day of the hearing that Muth is the parent of a handicapped child now over the age of 21 who was educated in the Denver Public Schools. Counsel did not at that time request that Muth disqualify himself. Sometime after the hearing, counsel for the District also learned that Muth is a member of the local governing board of the Association of Retarded Citizens ("ARC") and held an office on that board at the time of the hearing. According to counsel for the District, ARC frequently acts as advocate in favor of handicapped children and urges legal interpretations differing with positions of some school districts, particularly concerning clustering and mainstreaming.

B. Hearing and Decision

Neither party claims procedural errors in the course of the hearing. Counsel for Appellees did refer to numerous rulings adverse to her position as indicating a lack of bias or partiality on the part of the IHO. The focus of the contentions of error by both sides is, rather, on alleged substantive errors relating to both procedural and substantive issues under the EAHCA.

The IHO issued a 57-page decision dated February 21, 1990. After notations on procedural matters and findings of fact, the IHO listed issues framed in terms on the contentions of Appellees ("Petitioners" at that level) particularly the claim that the District failed to provide the child F.A.P.E. After discussing the issues and stating his conclusions, the IHO entered a series of orders. He concluded that:

> (1) The District's evaluation process did not cover the entire range required, the evaluations were inconsistent and invalid, and Petitioners had not been properly advised of their right to an independent evaluation;
>
> (2) The most recent, and prior, I.E.P.s submitted by the District were procedurally defective in that:
>
> > (a) the Parents were not properly advised of their right to due process and to an independent evaluation; and
> >
> > (b) the I.E.P.s were incomplete and not constructed in such a manner as to invite information on the Child's program and progress, particularly in omitting the information set out on Pages 1-3 except for the original;
>
> (3) The program offered was substantively defective in that:
>
> > (a) the proposed placement at Holly Hills violated L.R.E. requirements of the Act;
> >
> > (b) the alternative option of placement at Greenwood was not supported by an I.E.P. and did not offer a program allowing the Child to benefit educationally since "that program ... was being offered at Holly Hills";
>
> (4) Due to the procedural and substantive defects in the evaluation and I.E.P. process and I.E.P., the District failed to offer F.A.P.E. in the L.R.E. to the Child;

(5) Because the District failed to offer F.A.P.E. in the L.R.E., it would be required to pay the Child's tuition and transportation costs for 1989-90 at Havern;

(6) The District violated EAHCA rules and regulations in not evaluating the Child for a summer program and extended school year services should be considered at annual review;

(7) The Parents did not prove that they were entitled to reimbursement for tutoring;

(8) The Parents did not prove that outside mental health counseling and therapy was necessary to assist the Child to benefit educationally and therefore did not prove that they were entitled to payment or reimbursement for counseling or therapy services from the District; and

(9) Attorneys' fees could only be awarded by a Court and he (the IHO) therefore lacked jurisdiction to award them.

In addition to these conclusions on the issues, the IHO addressed the question of developing an I.E.P. for 1990-91 and subsequent years in his order. Based on his conclusions, and including the evaluation issue, he ordered as follows:

(1) That the District reimburse Petitioners (i.e., Appellees) for tuition and transportation of the Child for Havern for 1989-90, and if the parties could not agree on the costs, further due process hearing would be convened to set them;

(2) That the parties agree on an independent team to evaluate and staff the Child for 1990-91, including potential summer programming and listed areas for evaluation, with requirements and sanctions that:

(a) any reenrollment in a public school be at the school the Child would attend if not handicapped and meet the recommendations of the independent team;

(b) if the District refuses to participate in the process it continue to pay the expenses of the Child's education at Havern until the Child is staffed back in the public schools; and

(c) if the Parents refuse to participate or accept the staffing recommendation they give up their right to reimbursement for Havern after 1989-90; and

(3) That the claim for attorneys' fees was denied, although the IHO recommended that Petitioners be entitled to recover "a portion of attorneys' fees which matter shall be settled by the Courts."

DISCUSSION AND CONCLUSIONS

I. IDENTIFICATION OF ISSUES

The principal ultimate issue which counsel recognized and argued was whether or not the Parents were entitled to reimbursement from the District for the Child's expenses at Havern in 1989-90 under the EAHCA. The scope and content of the Order concerning independent evaluation and development of a 1990-91 I.E.P. involves similar, but not identical, issues. Both turned principally on the ultimate issue of whether or not the District offered F.A.P.E. to the Child in 1989-90 in compliance with the EAHCA. Appellees, in their appeal, contend that the IHO erred in failing to order additional reimbursement, principally but not solely attorneys' fees. Counsel in their detailed identification of issues and arguments and the A.L.J. in his review of the evidence, arguments and authorities have identified more particular issues, all either subordinate or related to the principal issues, for resolution in this appeal. In view of the scheme of the Act, including contemplation of a comprehensive determination on State level review, the A.L.J. has resolved and entered findings on all issues whether or not fully considered by the IHO.

The issues identified are as follows:

(1) Whether the IHO erred in holding that the district failed to meet procedural requirements, including the following subissues:

(a) whether the Parents were fully and properly informed of their rights, particularly the right to due process hearing if they disagreed with the District's positions, in the development of the Child's I.E.P.s;

(b) whether the staffings and review meetings met procedural requirements in addition to notice;

(c) whether the form and content of the I.E.P.s met legal requirements, including a clear up-to-date showing of the bases and content of services; and

(d) the effect of procedural defects on the issue of whether or not the District provided F.A.P.E. to the Child.

(2) Whether the IHO erred in holding that the District failed substantively to provide the Child with F.A.P.E., including the following subissues:

(a) whether the placement at Greenwood with Resource Room services reflected on the I.E.P. documents signed May 31, 1989, offered or would have provided F.A.P.E. to the Child;

(b) whether the placement at Holly Hills proposed and recommended by the staff offered the child F.A.P.E. in the L.R.E.;

(c) whether the District offered a placement providing F.A.P.E. fully supported by a legally sufficient I.E.P.;

(d) whether the IHO erred, or misinterpreted applicable law, in reaching his conclusions and, if so, whether such errors would require reversal under the circumstances; and

(e) the effect, if any, of the placement at Havern chosen by the Parents on the appropriateness of the placements offered by the District;

(3) Whether the IHO was correct in holding that the District violated the Parents' rights with respect to the evaluation, particularly in failing to inform them of the right to an independent evaluation, and the effects, if any, of such violation on the provision of F.A.P.E. by the District and of any error in that regard by the IHO on the outcome of this appeal;

(4) The correctness and appropriateness of the IHO's order concerning evaluation and staffing for 1990-91 and subsequent years, including the following subissues:

(a) the effect of any prior procedural or substantive errors by the District with regard to evaluation on the appropriateness of the IHO's orders, particularly in directing independent evaluations;

(b) the appropriateness of the directive that the evaluation include consideration of summer programming and extended school year;

(c) the legal authority for and appropriateness of the restrictions placed upon potential placement in the public schools of the District;

(d) the appropriateness of the sanctions provided for non-cooperation and non-compliance; and

(e) the effect of the determination of the issue whether F.A.P.E. was provided in 1989-90 on the appropriateness of the IHO's order.

(5) The nature and extent of reimbursement for Havern placement costs, if any, to which the Parents are entitled;

(6) Whether the IHO erred in denying reimbursement for costs of tutoring, counseling and therapy; and

(7) Whether and to what extent the Parents are entitled to reimbursement for attorney's fees, including the following subissues:

(a) the jurisdiction of the IHO and of the A.L.J. to award attorneys' fees;

(b) the criteria for determining the appropriateness of awarding fees and the amount of fees to be awarded; and

(c) the amount of fees, if any, to be awarded.

The A.L.J. is aware that the organization and statement of these issues differ somewhat both from the those of counsel in their respective appeals and the IHO's listing of issues in his decision. The issues as phrased do, however, embrace all issues which the A.L.J. regards as material. The A.L.J. did not list the alleged bias of the IHO as a separate issue, having rejected the District's blanket challenge on that basis to the entire body of findings. The A.L.J. has accepted the IHO's factual findings since they are supported by the evidence. The review process inherently involves consideration of the legal correctness and reasonableness of the IHO's interpretations and ultimate conclusions and those matters need not be stated as separate issues. The extent to which the A.L.J. disagrees with those interpretations, and the effect of that disagreement on the outcome of this appeal, are self-evident from this decision.

II. GENERAL LEGAL FRAMEWORK

The purpose of the EAHCA is to assure that all handicapped children have available to them F.A.P.E. including special education and related services to meet their unique needs. 20 U.S.C. § 1400(c); 34 C.F.R. § 300.1(a) 20 U.S.C. § 1401(a)(18) defines F.A.P.E. as special education and related services (a) provided at public expense and under public direction without charge, (b) meeting the standards of the SEA, (c) including appropriate education at the correct level, and (d) conforming to an I.E.P. as required under the Act.

The next subsection, 20 U.S.C. § 1401(a)(19), defines I.E.P., in pertinent part, as follows:

> "The term 'Individualized Education Program' means a written statement for each handicapped child developed in a meeting by representatives of the local educational agency . . . qualified to provide . . . specially designated instructions to meet the unique needs of handicapped children, the teacher, the parents . . ., and whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of each child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of specific educational services to be provided to such child, and the extent to which such child would be able to participate in regular education programs, (D) the projected date for initiation and anticipated duration such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, at least on an annual basis, whether instructional objectives are being achieved." (Emphasis supplied)

The Act and regulations show recognition that private placement is sometimes necessary. The educational agency is required to pay for the placement if it has not made F.A.P.E. available, but is not required to pay if it has made F.A.P.E. available. See 34 C.F.R. § 300.403.

The Act, Federal and State Regulations and the State Plan (established pursuant to the Act) set out procedures for evaluation, staffing and adoption and implementation of I.E.P.s. Those procedures contemplate parental participation in each decisional stage and provide the right to impartial due process hearing in the event of disagreement. Procedural rights are set out extensively in 20 U.S.C. § 1415.

In Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) ("Rowley"), the United States Supreme Court interpreted the requirements for an F.A.P.E. and discussed the procedural provisions of the Act and their implications. The court generally defined F.A.P.E. as personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction and rejected arguments and lower court holdings that the Act required programs to maximize each handicapped child's potential. The court construed the Act to require that handicapped children be given a "basic floor of opportunity" commensurate with the requirement of equal protection in U.S. Const. Amend. 14. 458

U.S. at 200. The court emphasized the importance of procedural rights as on equal footing with the measurement of the I.E.P. against ae substantive standard. It noted about the legislative scheme suggested that Congress believed that compliance with procedures, including full parental participation, would usually result in a substantively satisfactory I.E.P. 458 U.S. at 206.

The Supreme Court has also made clear that parents can obtain reimbursement for appropriate alternative placements (including private) if the LEA has not offered F.A.P.E. School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985) ("Burlington"). Court relied upon a general provision in 20 U.S.C. § 1415(e)(2) authorizing a reviewing court to "grant such relief as the court determines appropriate." The court held that the "stay-put" provision, 20 U.S.C. § 1415(e)(3), requiring that a child remain in an existing placement pending the outcome of an appeal, did not defeat reimbursement if the LEA's placement was inappropriate. The practical effect of the Burlington decision is that unilateral parental placement pending appeal is at the parents' financial peril. Reimbursement depends on the ultimate determination of the appropriateness of the placement offered by the District and of the private placement chosen by the parents. The Burlington court also held that the question of whether to order reimbursement, and in what amount, was to be determined by balancing equities. 471 U.S. at 367, 374.

III. APPROPRIATENESS OF DISTRICT-OFFERED PLACEMENTS

A. Context for Considering 1989 Staffing and I.E.P.

The Parents placed the child at Havern in the summer of 1989, between the time of the annual review staffing on May 31 and the beginning of the District's fall term. At the May 31 staffing, two I.E.P. Phase III documents were prepared and signed, one by the L.D. and S/L teachers and the Father for academic services and the other by the CBS and the Mother for behavioral services. No one else signed either and no one signed both. The A.L.J. discusses the legal sufficiency of these documents, together with previously signed I.E.P. pages, as an I.E.P. in the next subsection. It is clear that these documents represent what the Parents and special education teachers regarded as the Child's I.E.P. for 1989-90. The Child would have been enrolled at Greenwood under that I.E.P. if she had returned to District schools in the fall of 1989. That document must thus be considered the service-delivery portion of the Child's I.E.P. for 1989-90 and its appropriateness and sufficiency must be measured in determining whether the district offered F.A.P.E. to the Child. Since the staff recommended placement at Holly Hills at the same meeting, it is also necessary to consider that alternative in determining whether the District offered F.A.P.E. to the Child. Reimbursement for Havern would be precluded if, in light of both substantive and procedural considerations, the District offered F.A.P.E. with either placement.

Neither the May 1989 staffing nor the documents which resulted from it can be considered in a vacuum. The Child had spent almost four years in the District's special education program by the time the staffing occurred, and the history which that experience created was clearly important. That history was an important part of the framework in which both the Parents and District acted at the time of the staffing and thereafter. The IHO also clearly considered the context in his decision. The history was a record of practice as well as theory concerning what would or would not work for the Child. Building upon experience is normal in almost any venture and usually an aspect of any form of progress. History was particularly pertinent here because school and District professionals reiterated the Holly Hills recommendation at the staffing based on their experience. It is also evident that the history contributed to the frustration the Parents felt which eventually led them to remove the Child from the District and place her in a private school. The District's practice of using portions (Pages 1-3) of previous I.E.P.s as current also makes historical context important since a part of the resultant I.E.P. is a specific product of prior evaluations and staffings. Thus the 1989 staffing and 1989-90 I.E.P. are not isolated, but rather must be viewed in historical context along with prior I.E.P.s, evaluations and staffings and the history of the Child's progress and performance.

B. Procedural Compliance

The question of procedural compliance is, essentially, whether the District has met the procedural requirements of the Act and related regulations in the process of offering to provide special education services to the Child. The A.L.J. discusses the related issues of the effect of procedural violations, by themselves and in connection with other procedural or substantive defects, in the next subsection (part III C, pages 28-31. Although numerous issues have been argued and procedural points noted in the IHO's decision, the procedural compliance issue has two primary aspects. These are notice, particularly as it affected Parental participation in the process, and sufficiency of the I.E.P.s themselves in form and content.

The IHO found that the Parents were told of their rights at the beginning of the process, when the child was first evaluated and staffed, but were not subsequently informed. He found that they were unaware of their rights, particularly to impartial due process hearing and independent evaluation, at crucial times later in the process. The evidence fully supported these findings. The written evaluation consent form which the Mother signed in September 1985 included a listing of parental rights. More probably than not (although the IHO made no finding on the point) the Parents were also supplied with then-current handbooks and brochure, which included explanation of rights, at the outset of the process. The IHO noted, and impliedly accepted, the Parents' testimony that they believed the rights only applied to the initial evaluation and placement process. The record, including logical consideration of the Parents' actions, supports the finding. Most subsequent notice forms were short and all omitted that any explanation of parental rights. Without explanation (preferably in writing) before all meetings there is no clear way to assure that parents realize their rights and the importance of their full participation in the process. The belief the Parents expressed is not unreasonable in view of the combination of a full explanation at the initial stage and no mention of rights later.

The Act and State Plan clearly place responsibility on the District to keep parents informed of their rights at all subsequent phases and not just initially. § VI B1(a) of the State Plan sets out requirements for written notice to the parents each time an action is proposed concerning a handicapped child. A full explanation of procedural rights is the first item listed. The notice requirement for review staffing under Subsection 5 of the same section do not specifically require inclusion of an explanation of rights. Providing such explanations is clearly the better practice, however, especially if a potential change of program is involved. Failure to include the explanation when the transfer to Holly Hills and addition of CBS services were proposed specifically violated the State Plan.

Lack of parental awareness of their right to a due process hearing inherently affects the entire process. Full exchange is difficult for participants who do not realize that they can disagree and, if necessary, have that disagreement resolved fairly and impartially. The Parents clearly were informed and realized that their consent was necessary to a change. They did not, however, understand the extent of their rights and the possibility of looking to other alternatives to benefit their child. The resulting process was uneven because the Parents believe they were not on an equal footing with the District. The IHO also mentioned the fact that some I.E.P.s were pretyped, particularly for annual reviews. This suggests that staff professionals had already devised plans. It does not in itself show procedural violation, however, Parts were evidently formed at staffings. The Parents' participation may have been further hindered by the practice, but they did participate. Pre-preparation of anticipated features of a plan is often advisable, and violates no procedural rights so long as final decisions are made at the staffing itself.

The District's normal procedure, which it followed in this case, is to prepare an entire I.E.P. at the initial staffing and not to reprepare or reissue Phases I-II (Pages 1-3) unless the review process or staffing indicates that a change is needed. Prior to annual review, the "Phase IV" column on Page 4 is completed indicating evaluation of progress, and a new Phase III (on one or more Page 4s) is prepared if the student remains in special education. The operative I.E.P. then becomes the combination of the pre-existing prior pages and the revised Page 4. Pages 1, 2 and 3 may be rewritten at the time of triennial review. At the triennial review here, Page 1 was rewritten with some changes in strengths and weaknesses and a virtually identical condition description and Pages 2 and 3 remained unaltered. Thus the child's formal I.E.P. for 1989-90 consisted of Page 1 as rewritten in the fall of 1988, Pages 2 and 3 written in the fall of 1985, and two Page 4s written in May 1989.

Page 4 of the District's I.E.P. form includes a statement of annual goals, projected date of initiation and anticipated duration, and criteria for evaluation. It facially meets three of the mandatory requirements of 20 U.S.C. § 1401(a)(19), supra. It includes a statement of specific educational services to meet part of another requirement, but does not state the extent to which the child participates in regular programming. Regular program time can be calculated by a person who knows the total daily or weekly hours of school for the grade level if the "Timeline" states the number of hours per day or week in special education. It does not provide for a statement of the present level of performance, although the prior year's Phase IV provides some of that information as it relates to the specific goals of the previous plan. Pages 1-3 do not contain any specific place for listing present levels of achievement, but that factor can be included under strengths and weaknesses or prioritized needs. Section C of Phase II, on Page 3, contains a specific space for listing portions of time in regular and special education, with different spaces for academic and non-academic regular time. A plan for a year after the first with an unrevised Page 3 can comply with the EAHCA requirement if proportions of special and regular education reflected in the revised service plan (page 4) remain the same as in the original I.E.P., including the unincorporated Page 3. Since improvement is always a goal of special education, the success of any I.E.P. in which the proportions of service delivery remain the same each year may be open to question.

The Child's time in special education increased, and her time in regular education accordingly decreased, each time the I.E.P.s were revised up through March 1989. Pages 2 and 3 were not revised, even at the triennial review, and no percentages were listed in Section C on the original Page 3. Thus the systemic defect inherent to any case where service delivery changes and Phase II does not change occurred here. In addition, none of the I.E.P.s contained, in themselves, statements of the Child's then-present level of performance. The Phase IV portion of each previous year's I.E.P. gave scores of results related to specific educational goals. They did not, however, give complete and understandable statements of her level of achievement at the time of adoption of each new I.E.P. The statements of strengths and weaknesses, eligibility, and prioritized needs--the most logical apparent places for listing present levels of achievement--contain no reference to it.

The content of the I.E.P. reflects two other procedural defects in addition to incomplete compliance with 20 U.S.C. § 1401(2)(19), *supra*. The first is apparent from observation of the process. At the special staffing in November 1987, professionals working with the Child at Greenwood suggested that she be transferred to the SL/LD program at Holly Hills and also recommended the addition of the CBS to work with behavioral problems. The existence or perception of educational need, or of greater priority of need, for these services is inherent to both suggestions. The very fact of suggesting a change indicates that both needs are either new or newly seen as important enough to require a change in service. The statement of needs in Phase II of the I.E.P., however, was not changed. That omission can only be appropriate if the needs themselves were so broadly stated as to be almost meaningless. In fact, neither need is apparent from the unrevised Phase II. The Mother agreed to add CBS services, although she declined transfer to Holly Hills. Writing an additional Page 4 for CBS services without adding to Pages 2 or 3 to reflect the need or bases for those services made the I.E.P. internally inconsistent. It was therefore defective because it did not describe a need for some services which were provided. 20 U.S.C. § 1401(a)(19), *supra*, requires an I.E.P. designed to meet *unique needs* each child, although statements of need are not specifically listed as a mandatory requirement. Section X B of the State Plan requires, *inter alia*, that the needs of each child be identified, clustered and prioritized, and that the placement reflect those needs. Documentation and completion of I.E.P.s is a consistent theme of the Federal and State Acts and Regulations as well as of the State Plan. An I.E.P. which provides for services without documenting the need for those services violates these requirements.

The remaining major procedural defect is less tangible. Proportionally little of either the carryover pages or the periodically revised Page 4 of the entire sequence of I.E.P.s is written in plain English understandable to persons (including parents) not familiar with the jargon of the field. The defect is apparent on Page 1 of the first I.E.P., culminating with descriptions of the handicapping condition in terms of "delays in visual motor integration" with reference to particular tests. The description is not only not written in plain English but does not even use the identifying term "learning disability" (or its initials, "L.D.") commonly used in the field. The remainder of the I.E.P. is replete with references to particular tests or educational materials by initials and with specialized terms or other educational jargon without explanation . At least some of the meaning of words peculiar to the field apparently differs from normal English usage. Measure of achievement frequently is stated in terms of test scores without descriptions, explanations or frames of reference such as normal performance or change from the Child's prior level. Understanding the program, and the extent of the Child's success or failure under it, is inherently difficult for those who are not educational professionals. It may be difficult, as well, for professionals not familiar with the Child's history. The I.E.P.s as a whole leave an impression of being designed more to confuse than to enlighten. Nothing in the Act, regulations or State Plan explicitly requires that I.E.P.s be understandable. The spirit of the law, however, particularly in view of the emphasis on parental participation expressed in Rowley, inherently requires some mutual means of communication. These I.E.P.s do not provide it. The use of plain English also assists due process review, since few of those charged with considering and deciding the issues are likely to be familiar with the jargon. An overwhelmed parent might well defer to the professionals because he or she does not understand what they say a child needs. A reviewing IHO, A.L.J. or Judge cannot do so, however. The review function requires consideration and understanding of the facts. Experts, and expert-produced documents, are most helpful when they can be understood.

Due to the defects described in this section, the A.L.J. upholds the IHO's conclusion that the I.E.P.s and the process by which they were developed were procedurally defective. The effect of those defects is discussed in the next section.

C. Substantive Compliance

1. Consideration of Alternative Offers

The IHO held that the District had not offered F.A.P.E. to the Child because the Holly Hills placement which the staff recommended did not meet the L.R.E. requirements and the offer of extended time at Greenwood was not supported by a definite I.E.P. showing how services would be provided to benefit her educationally. The essential issue is the legal correctness of this result, and not the reasoning by which the IHO reached it. Since the Greenwood placement was contemplated by the I.E.P. documents signed and the Child would have gone there had she not gone to Havern, the A.L.J. considers its appropriateness first.

2. Greenwood

The I.E.P. Page 4s which were signed for 1989-90 listed academic objectives more broadly and in a shorter form the prior plans, but to the same general effect. They included a goal of one year's growth in reading which the Child had consistently failed to meet and listed new behavioral goals, also broadly. The timeline column did not include any time in special education in general or in particular aspects, or any amount of time remaining for regular education. Absent an indication of change, it is reasonable to assume that the participants meant to continue the scheduled 12½ hours per week in special education which had been established two months before. When the I.E.P. documents were signed, the staff had reiterated its recommendation of placement in the more intense program at Holly Hills and the Mother had expressly re-rejected it. The Child's performance at Greenwood had been marked consistently by academic failure even though she did well in non-academic subjects and was promoted in spite of failing grades. Parents' frustration with the Child's progress was obvious and subsequently resulted in the placement at Havern.

The premise implicit in all the circumstances is that the Resource Room L.D. program at Greenwood was inadequate to meet the Child's needs and everyone involved in the staffing knew it. The District now contends that Greenwood was an adequate placement. At the time of the staffing no one acted as though they believed that was true. That the staff was consistently recommending a transfer to a program elsewhere implies recognition that the services available at Greenwood were inadequate to meet the Child's needs. The record of past performance supports this conclusion.

The Rowley court recognized that genuine, and not mere token, benefit from special education was necessary to constitute F.A.P.E. The court noted that if a child is being educated in regular classrooms, the I.E.P. and personalized instruction "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 458 U.S. at 204. Clearly here, although the Child was advanced from grade to grade she did not achieve passing marks and her promotions were essentially social. Academic performance was consistently below grade level and falling further behind. Most significantly, those teaching her repeatedly sought to have her moved to the more intense program at Holly Hills. The record does not provide a reasonable basis for a finding that the Child benefited educationally from the placement at Greenwood or that there was any reasonable likelihood that she would have benefited from it had she returned to that setting, even with the continuation of the increase in Resource Room time. The defects in the I.E.P. already noted also support the IHO's conclusion that the proposed placement at Greenwood is not supported by a legally adequate I.E.P. For these reasons--primarily the history of substantive failure to benefit the Child and the Greenwood staff's own recognition that its program was inadequate--continued placement at Greenwood did not provide and would not have provided F.A.P.E. to the Child. Therefore, the I.E.P. providing that placement did not constitute or represent an offer of F.A.P.E. for 1989-90.

3. Holly Hills

Holly Hills offered academic benefits which were not seriously disputed and which the IHO apparently did not consider subject to question. The preponderance of the evidence would support a finding that the Holly Hills program was academically comparable to that at Havern, although experts disagreed about approaches and which program might be better. The IHO concluded that Holly Hills did not meet the standards of the EAHCA and the State Plan for L.R.E., and was therefore not an appropriate placement regardless of the academic benefit. The IHO based his finding on (1) physical separation of the Holly Hills unit from the remainder of the building; (2) cross-categorical, varied-grade placement including younger and older, mentally retarded and disturbed children; (3) the Parents' opposition to the placement; and (4) the potential damage to the child's already low self-esteem. In discussing the issues, the IHO expressed the view that these circumstances, particularly physical separation of the facility, were contrary to the objective of mainstreaming expressed in the Act. He quoted with approval authority that placement which may be academically better than other alternatives could still be inappropriate because of failure to provide for mainstreaming. Roncker v. Walker, 700 F.2d 1058 (6th Cir. 1983). The IHO also commented that the fact that the District had only four self-contained L.D. programs appeared more for the District's convenience than the students' benefit. The District has argued in this appeal, inter alia, that mainstreaming to the extent appropriate for the Child is available at Holly Hills and no more is required under the circumstances; that cross-categorical placements and clustered services are permissible and may in some instances be economically necessary; and that the physical separation is insignificant because the modular unit is close to the portion of the Holly Hills building used for students in the Child's grade range and thus facilitates mainstreaming.

The Act and related regulations show consistent recognition that each handicapped child's circumstances are peculiar to that child. Each program must be geared to meeting the needs of the particular child involved. The definition of I.E.P. (beginning with the word "individualized") emphasizes meeting the unique needs of each handicapped child. The Rowley court recognized that feature as well. That principal provides the key basis for determining the issue of the appropriate placement for the Child. The question is not whether Holly Hills would be appropriate for children with severe learning disabilities generally, nor whether circumstances cited by the IHO--physical separation, inclusion of children of different ages and with different handicapping conditions, clustering of services or degree or mainstreaming available--make placement there inappropriate either generally or for any other specific student. The issue is appropriateness for this Child considering the circumstances unique to her.

Based on review of the evidence and factual findings of the IHO, the A.L.J. concludes that Holly Hills did not constitute an appropriate placement in the L.R.E. for the Child. The primary basis for this conclusion is the likelihood, based on the findings from the evidence and expressed parental concern, of damage to the Child's already fragile self-esteem from that placement under the circumstances as they existed and appeared to exist at the time of the staffing. The key factors in this regard are the physical separation of the program from the rest of the school and its potential emphasis of the Child's self-identification as handicapped or "different"; the likelihood of the Child identifying with lower-level students in the class; and the great concern expressed by the Parents about the Child's self-esteem issue in the light of their peculiar knowledge of her. For these reasons, the placement would not benefit the Child here involved. Therefore, it was not appropriate and the District did not offer F.A.P.E. by proposing it. Since the unique needs of the Child made the placement at Holly Hills inappropriate, the correctness of the general legal interpretations of the IHO which led him to the same conclusion is not material to the issue.

4. Effect of the Havern Placement

The District has also argued that Havern, in which the Parents placed the Child, has many of the characteristics which they found objectionable about Holly Hills. The argument is, in effect, that Havern is no less restrictive than Holly Hills. The District contends that either Havern is not appropriate for the same reasons applicable to Holly Hills or the Havern placement shows that Holly Hills is actually appropriate. The A.L.J. rejects the argument. Holly Hills was inappropriate due to the unique circumstances and needs of the Child; the characteristics do not necessarily make it inappropriate for any other children. By the time of the hearing, the Child had been at Havern approximately one half of the academic year and was benefitting, with apparent improvement in her self-esteem. Experience had thus demonstrated the positive appropriateness of Havern. Further, even though Havern has some of the characteristics on which the Parents based their objection to Holly Hills, some of the most important aspects affecting the Child's self-esteem are different. That the students are in a range from low-average to above-average intelligence obviates the concern that the Child would identify with mentally retarded students. Havern does not have the physical separation of special education unit from the facility as a whole, with its inherent potential damage to self-esteem. That most or all of the other students have similar characteristic reduces the potential for feeling of isolation and inferiority. Failure in regular classrooms at Greenwood and potential separation with other handicapped children at Holly Hills would probably have fostered that feeling in the Child. Therefore, Havern's substantial distance from the Child's home school, limited age mixing, and student body consisting of children who share the Child's handicap do make it inappropriate and its appropriateness does not also render Holly Hills appropriate.

5. Conclusion on F.A.P.E. Issue

Since neither of the programs offered by the District was appropriate, the District did not make F.A.P.E. available to the

Child. The IHO's conclusion that the parents are entitled to reimbursement for expenses at Havern for the 1989-90 school year was thus correct and must be upheld.

IV. THE ORDER AFFECTING FUTURE I.E.P.S

A. The Evaluation Issue

The IHO concluded that the District committed major errors regarding the evaluation of the Child by leaving inconsistent and possibly inaccurate evaluations unresolved and by failing to keep the Parents informed of their continuing right to independent evaluation. His conclusions on the subject did not directly affect the reimbursement issue but served as a major premise of the order for independent evaluation for 1990-91 and development of an I.E.P. for that and subsequent years.

The evidence supported the IHO's findings concerning the consistency and accuracy of the evaluations. Even without those findings, the need for independent evaluation was clear. The evaluation of intelligence and cognitive ability was the most strikingly, inconsistent and was also emphasized by the IHO. The Child's I.Q. according to the 1988 test was substantially lower than shown in 1985 test. Other evidence, as the IHO noted, suggested higher intelligence than the 1988 testing indicates. The combination of a learning disability, a poor self-concept and attention deficit disorder (especially if the Child was not taking medication at the time of the test, which could have affected her concentration and attention span) may also have contributed to the lower 1988 score. The performance and verbal discrepancy is also baffling. In both tests the verbal score was higher although the opposite is sometimes true with L.D. children. The performance score in the 1985 test was questioned, yet if that score was artificially high the discrepancy would actually have been greater in both tests than the testing indicated. The inconsistencies in results and observations call into the question whether those involved with the Child's education have yet measured her intelligence accurately. It is not clear which, if any, prior tests accuratley reflect her level.

Evaluation of the nature and extent of the Child's learning difficulties is also puzzling and inconsistent. She hears and sees normally in the general sense. Some testing indicates difficulty discriminating sounds, however, and she has had vision therapy related to reading. The one tested area reflected on I.E.P.s where she had scored at or even above grade level is letter identification; yet she is described as dyslexic and has had difficulty perceiving letters and words. The extensive educational jargon also makes it difficult not only to determine where the Child's problems lie, but also to understand the testers' diagnoses and opinion.

Given all the inconsistencies, an independent evaluation--preferably with the results written in plain English--is appropriate.

The IHO also found a serious violation of the EAHCA by failure to keep the Parents informed of their right to independent evaluation. The appropriate remedy for that violation is that directed by the IHO--independent evaluation at District expense. Selection of the team by mutual agreement is appropriate, although it may be difficult in view of the adversary positions of the parties. If counsel cannot agree, it is most appropriate that the experts involved in the hearing, who have some knowledge of the Child, from both sides be involved in the selection process, evaluation or both.

B. Extended School Year

The IHO found that the District committed "a major violation of the EAHCA Rules and Regulations" by not evaluating the Child for summer programming. As with evaluation, the violation the IHO found was not apparently a basis for the reimbursement order and the question was addressed primarily regarding future evaluations. There were no findings that the Child had previously regressed over the summer break to a point where extended school year would become a necessary component of F.A.P.E. The District, in its brief, conceded that summer programming should at least have been addressed and indicated that it will be addressed in future evaluations. Addressing it is appropriate in developing future I.E.P.s. Whether or not it is included must depend on the evaluation, or at least more history than was apparent in the hearing. Appropriateness of and necessity for summer programming depends primarily on the likelihood of regression in learning during the summer and the extent of time necessary to recoup prior gains. The essential test is set on Armstrong v. Kline, 476 F. Supp. 583 (ED. Pa. 1979), aff'd. sub nom Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980). The A.L.J. considered the issues extensively and J.H. v. Littleton Public Schools, Case No. ED 86-11 (1987).

C. The Restrictions on Public Placement

The IHO directed that any I.E.P. providing for re-enrollment in the public school offer a program (1) meeting the recommendations of the independent evaluation team, (2) located in "the school that [the Child] would attend if she were not handicapped" (3) including all services necessary to the Child "that are available in other schools in the District, which would allow [the Child] to achieve educational benefit in the least restrictive environment." The IHO did not explicitly state the rationale for this requirement; it is apparent from the decision as a whole, however, that it is based on his emphasis of mainstreaming and L.R.E. requirements. The IHO's criticism of the District for establishing four SL/LD centers as "not being designed to meet the students' needs" (decision at 48) is obviously significant.

The IHO's order, as framed, squarely presents the question of the appropriateness of the District's practice of clustering services. Nothing in the EAHCA or Federal Regulations specifically requires that all services, regardless of their nature, be offered in the student's home school. The State Plan, at section X A, sets out general policies on L.R.E. These include requirements for availability of a continuum of placements with an array of services; that the child be educated "in the school which he or she would attend if not handicapped" unless the I.E.P. requires another arrangement, with any other placement as close as possible to the child's home. Since the possibility of an I.E.P. providing for services elsewhere is explicit, the Plan does not require that all special education services be provided in the home school regardless of their nature. The A.L.J. agrees with counsel for the District that practical considerations, including financial resources and numbers of students involved, are important. The number of students and student-teacher ratio serve to illustrate the intensity and degree of use of a program. The Holly Hills grade 4-6 program serves 11 to 13 students from five or six schools over a three-grade range, an average of approximately two students per school. The principal teacher in the program is highly qualified, holding two Master's degrees. Clustering such a service is clearly reasonable. The practical result is probably more benefit to the students as well, since providing S/C services to every school could well limit funds any school could have available to attract able and experienced teachers. Clustering might well be inappropriate for services substantially more widely used than is apparent with the District's SL/LD program. Its use for the SL/LD program in Cherry Creek, however, is appropriate.

The requirement that the placement meet the recommendations of the independent evaluation team is obviously appropriate. The IHO did not place other restrictions on potential public school placement so as to require the A.L.J. to consider other concerns expressed in the decision, such as cross-categorical placement and the extent of mainstreaming. The restrictions to the school the Child would attend if not handicapped is inappropriate and unauthorized, and must be reversed.

D. Sanctions Provided

The IHO ordered that if the District did not cooperate in the evaluation or provide an I.E.P. based on and consistent with it, it would be required to continue reimbursing Appellees for Havern expenses until "such time as the Child is staffed back into the public schools." The nature and purpose for the order is appropriate, although its duration is vague. It is more appropriate to provide that if no independent evaluation is being conducted because of District non-cooperation the Child shall remain at

Havern until the staff there decides she should be returned to public school. By normal Havern policy, as indicated in the record, this would be two to three years from the time of initial placement.

The IHO further ordered that if the Appellees refuse to participate in the evaluation and assessment, or to accept a placement recommended as a result of it, they would surrender their right to future reimbursement for private school placement after the end of the 1989-90 school year. This, again, is appropriate. The IHO, in essence, instructed the parties to cooperate to find a program to benefit the Child and attached financial consequences as sanctions for non-cooperation. That approach is wholly appropriate.

V. OTHER REIMBURSEMENT ISSUES

A. Tutoring and Counseling

The IHO denied the Parents' request for reimbursement for the expenses of tutoring and of counseling and therapy. He held in both instances that Appellees had not met the burden of proof on the issue. These were essentially factual conclusions within the province of the IHO. The A.L.J. will not disturb his findings.

Regarding counseling and therapy, the IHO determined that "it was not clearly established that the reason or need for this outside mental health counseling/therapy was to assist [the Child] to benefit educationally." He cited the definition of "related services" in 20 U.S.C. § 1401(a)(17), which lists a series of specific services "as may be required to assist the handicapped child to benefit from special education." The IHO applied the correct test. He held that Appellees had not proven that the counseling was centered around educational needs or necessary to assist the Child to benefit educationally. The holding was within his province as the trier of fact and he applied the correct legal test, and will be upheld.

B. Havern Costs

By direction of the A.L.J., counsel submitted statements of costs at Havern by affidavit and the listing of amounts. As direct costs, the affidavit lists $6,570 tuition, $21.30 interest on the tuition and a $100 deposit for 1090-91. The Parents claim transportation expenses of their own and for the Child's grandfather. In addition, the Parents seek reimbursement for their time and the paternal grandfather's time of travel. Other items included in the affidavit are not directly related to Havern.

Based on the conclusion that the District is liable for Havern costs because it did not provide F.A.P.E. in 1989-90, the Parents are fully entitled to tuition of $6,570 and interest on the tuition of $21.30. Reimbursement for the deposit for 1990-91 is appropriate since it was apparently necessary to hold a place in the class and the process of developing the I.E.P. could result in Havern placement. Those costs are subject to little dispute.

The A.L.J. agrees that travel expense, in the sense of the real costs of the operation of a vehicle or cost of other transportation (such as bus) is appropriate for reimbursement. The rate of fifty cents per mile is high, especially in view of the fact that public agencies presently charge and allow substantially less. The A.L.J. will allow thirty cents per mile, which still exceeds the amount allowed by the State of Colorado, or the Federal Internal Revenue Service for tax purposes. The additional cost apparently is for travel time, or providing the service of transportation in addition to out-of-pocket costs. Counsel for Appellees states in the cover letter with the affidavits that $15 per day "was paid" to the paternal grandfather and the $10 "was requested" for the Parents. The discrepancy between the amount claimed and paid to the grandfather and his travel cost at thirty cents per mile is not great ($1,020 as opposed to $979.20). Accepting the premise that the grandfather was actually paid that amount, $15 per day will be allowed rather than the per-mile travel expenses. The A.L.J. will not approve paying the Parents separately for the service of transporting their own child. Travel reimbursement for the Parents will be limited to costs at thirty cents a mile.

Therefore, the Parents are entitled to reimbursement of the following expenses at Havern:

Item	Amount
Havern Center Tuition 1989-90	$6,570.00
Interest on Havern Center tuition	$ 21.30
Deposit for Havern - 1990-91	$ 100.00
Transportation by Parents 3,210 miles x .30	$ 963.00
Transportation by paternal grandfather - 68 days x $15. day	$1,020.00
TOTAL:	$8,674.30

C. Attorneys Fees

The IHO held that he did not have authority to award attorneys fees. Appellees included a claim for such fees in their cross-appeal and submitted a bill for the fees with the affidavits. The District opposes the request.

The State Plan, at VII B(9), provides in pertinent part that a parent who prevails in "any action or proceeding" under the EAHCA may seek to recover "reasonable attorneys fees and related costs pursuant to sections 1 and 2 of the Handicapped Children's Protection Act of 1986." The HCPA amended 20 U.S.C. § 1415(e)(4) to provide for an award of attorneys' fees by "the court" as part of costs to parents of a prevailing handicapped child. The District cited case law construing the provision to limit authority to grant fees to judicial system courts to the exclusion of hearing or reviewing officers involved in the administrative process. Counsel also cited a statement in the legislative history of the HCPA that the committee intended that the statute allow the court but not the hearing officer to award fees.

In C.S. v. Boulder Valley School District No. RE-2, Case No. ED 89-05 (1990), the A.L.J. construed the HCPA and State Plan to authorize an award of fees in the context of an administrative hearing. The A.L.J. in that case denied the request for fees based on the ultimate outcome and the reason for his conclusions. There, the A.L.J. reversed an IHO finding denying any reimbursement for private placement. The decision was based on balancing of the equities, and set out conditions limiting the amount reimbursable to one substantially less than had been sought. The A.L.J. determined that the proper exercise of his discretion would be to apply the normal and traditional principle that litigants pay their own fees.

The reference to legislative history, while informative, is not wholly persuasive. The apparent reasoning behind the HCPA amendment was to remove the deterrent to pursuit of parental rights which attorneys' fees can sometimes create. That rationale exists as much in the case of administrative proceedings as in that of judicial proceedings. The language of the State Plan is simple and direct, and facially authorizes an award of fees. Nothing in the language suggests it is confined to judicial review. Therefore, the A.L.J. concludes that he has (and the IHO had) jurisdiction to award fees.

The exercise of the jurisdiction to award fees necessarily invokes the sound discretion in the A.L.J. It is necessary to consider all of the circumstances involved. This case is extremely close. The A.L.J. upheld the IHO's award of reimbursement for the 1989-90 school year on the basis of the unique needs of the student involved. The A.L.J. also reversed restrictions placed by the IHO on public school placement for subsequent years. The A.L.J. agreed with some of the District's general legal contentions which may have been of particular concern in appealing and rejected the arguments of Appellees on their cross-appeal. All those circumstances bear significantly on the question whether, and in what amount, to award fees.

Counsel for Appellees sought total attorneys' fees, as of June 3, 1990, of $112,532.50 for a total of 728.75 hours at $150 per hour and 80.5 hours of administrative support at $40 per hour. She has submitted an affidavit from an experienced Denver attorney to the effect that $150 per hour is reasonable compared to prevailing rates in the area.

The amount and reasonableness of the fees claimed is an appropriate and necessary consideration. Counsel here seeks approximately thirteen times the amount awarded her client as reimbursement, and over eight times the combined total of all reimbursement sought. The disproportionality of the fees claimed to reimbursement awarded is obvious. When the cost of litigation so far exceeds the amount at issue, the efficacy of the entire legal system comes into question. A school district can act in good faith to do its best for a handicapped child yet, in the end, face costs far in excess of the private school expenses or other costs at issue. That circumstance could, in turn, make the exposure in EACHA litigation so prohibitive as to discourage resistance to any claim. For the system to work under such "tail wagging the dog" circumstances is difficult at best, and the A.L.J. will not encourage it. An award of reasonable attorneys fees is permitted, but not one which is wholly disproportional to the matters at issue. Reduction to a proportional amount might be appropriate in a less close case or one where the District had acted in bad faith, but not here. The A.L.J. exercises his discretion to deny the claim for attorneys' fees in its entirety.

DECISION

For the reason stated in the body of this decision, superseding the reasoning of the IHO where different, the conclusions of the IHO that the District failed to provide free appropriate public education to the Child for the 1989-90 school year, and is therefore liable to Appellees for reasonable expenses of the placement of the Child at Havern Center for that school year, are hereby affirmed. The orders of the IHO directing such reimbursement, providing for independent evaluation of the Child for placement in 1990-91 and subsequent years, directing sanctions to the respective parties for non-cooperation with such evaluation and placement, and denying the other claims for reimbursement by the Appellees, are also hereby affirmed. The portion of the order concerning special education placement for 1990-91 and subsequent years which directs that any public school program for the Child be in the school she would attend if not handicapped is hereby reversed. The conditions for placement in public schools are modified to provide that the District be required to demonstrate that it has available a program which can meet the recommendations of the independent evaluation team and provide significant educational benefit to the Child in an educational environment not damaging to her self-esteem under the circumstances found from this proceeding and, if that placement involves the SL/LD program at Holly Hills, that the principal bases of concern about that program and facility (relating to effect on self-esteem) would not exist or have ceased to be significant potential sources of damage to the Child's self-esteem as of the beginning of any school year for which the plan is proposed. Either party may submit any disputes concerning such evaluation and placement, including any sanctions concerning the claims of non-cooperation, to the A.L.J. for summary disposition.

DONE AND SIGNED this
23 day of July, 1990

DON P. STIMMEL
Administrative Law Judge

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado to: Darryl Farrington, 6300 S. Syracuse Way, #555, Englewood, CO 80111; Elizabeth Banks Kolkoski, 7632 Cruz Bay Court, Las Vegas, NV 89128; on this 23 day of July, 1990.

Secretary to Administrative Law Judge

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CERTIFICATE OF HAND DELIVERY

I, Peggy Biergaard, certify that I hand delivered the above **DECISION UPON STATE LEVEL REVIEW** to William Randall, Commissioner, Department of Education, 201 E. Colfax, Denver, CO 80203; on this 23rd day of July, 1990.

Peggy Biergaard

Secretary to Administrative Law Judge

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Case Number: L89:103

Status: Impartial Hearing Officer Decision

Key Topics:
Individualized Educational Plan (IEP)
Free Appropriate Public Education (FAPE)
Assessments
Stay-Put Provision
Procedure of Hearing
Notice of Procedural Safeguards
Right to Attorney Representation

Issues:

- Did the district provide child with an adequate IEP?
- Did the district offer an appropriate placement?
- Were evaluations appropriate?
- Did the district improperly delay in identifying student as handicapped?
- Was the stay-put provision violated?
- Were the parents' rights to due process violated?

Decision:

- Procedural violations are without harm or without merit.
- Time period within which assessments were completed was reasonable.
- Parents did not receive timely notice of all procedural rights particularly right to have attorney at the staffing.
- District did offer an IEP and recommended placement designed to provide educational benefit to the student.
- District must correct rights notices.

Discussion:

- Detail witness testimony regarding assessments.
- Procedural status of case.
- Education history of the child.

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Cont'd

- Notice requirements in EHA, Colorado Rules,
- Function of staffing committee.
- Development of IEP.

IN THE MATTER OF [redacted]
PETITIONERS: [redacted]
pro se
RESPONDENT: Weld Boces Consolidated District
represented by Margaret Sickel,
and Kenneth DeLay,
attorneys

Case #: L89:103

FINDING OF FACTS

[redacted] requested an Impartial Due Process Hearing on behalf of their son [redacted]. Their request was received December 7, 1989 by Dr. Karl Schmidli, Director of Special Education for Weld Boces which provides services to Weld Central RC-35.
The [redacted] who were given the names of possible attorneys and a parent advocate, but were unable to obtain representation, proceeded with the hearing pro se (representing themselves) The Colorado Department of Education provided the [redacted] with a copy of the Colorado Code of Regulations. Weld Boces was represented by Margaret Sickel, attorney, and Kenneth DeLay, attorney.

[redacted] is a bright, creative twelve and a half year old boy with mild central auditory processing and visual motor integration difficulties. Also [redacted] has moderate behavior problems in school. He has been observed picking his skin, pulling out his hair and hitting his head against lockers. He makes noises such as imitating Donald Duck during school and has been disciplined for fighting. [redacted] has difficulty relating appropriately to his peers or taking responsibility for his actions.

[redacted] received special education services through fourth grade. At the end of fourth grade [redacted] refused the placement recommendation for [redacted] for fifth grade, and [redacted] was home schooled. [redacted] attended regular sixth grade classes last year at Hudson Elementary and regular seventh grade classes this year at Weld Central Junior Senior High School . By October [redacted] grades were failing or nearly failing.

On October 16, 1989 [redacted] asked Don Foster, the Educationally Handicapped Teacher, to observe [redacted] Mr. Foster observed [redacted] for two weeks and referred him for a child study. A child study conference was held November 2, 1989, and resulted in a referral for an educationally handicapped (EH) assessment. Also, it was recommended that gifted EH programs be investigated.

On November 3, 1989 Brian was suspended for one day for fighting and has not returned to school. Some of his teachers sent work home for [redacted] to complete. [redacted] signed a parental consent for evaluation November 13, 1989, the first evaluation was conducted November 15, 1989 and on November 30, 1989, a staffing was conducted.

Although the staffing resulted in a recommended individualized education program (IEP) for [redacted] the evaluations upset [redacted] and hostile words were exchanged. While the flow of information was inhibited, a placement recommendation was made. The committee recommended fifteen hours per week of EH services with Don Foster and four periods per day of regular education. Both [redacted] refused the placement recommendation. Weld Boces proceeded with a nonattendance action.

The same day as the staffing, November 30, 1989 Dr. Losee, Principal of Weld Central sent a letter to the [redacted] advising them that work would no longer be sent home and that it was in [redacted] best interest that he be in school.

On December 5, 1989 the [redacted] requested an impartial due process hearing.

ISSUES

1. Did Weld Boces provide [redacted] an inadequate individualized education program, (IEP)?
2. Did Weld Boces offer a placement for [redacted] which was appropriate?
3. Did Weld Boces utilize inadequate or inappropriate social, psychological, or behavioral evaluations in [redacted] IEP or placement recommendations.
4. Did Weld Boces fail to identify [redacted] asnd handicapped in a timely manner?
5. Did Weld Boces violate Section 1415 (e) (3) of the Education for the Handicapped Children's Act which requires that during the pendency of any proceeding conducted pursuant to this section, unless otherwise agreed, the child shall remain in the then current educational placement. . . until all such proceedings have been completed, by Weld Boces failure to send [redacted] homework after the [redacted] requested a due process Hear?
6. Did Weld Boces violate the [redacted] Due Process Rights?

At the close of petitioner's case, respondent moved to dismiss issue 3, 5, and six. The motion was sustained for issues five and six and denied for three.

STAY PUT PROVISION

[redacted] was suspended from school for one day. Weld Boces was prepared to continue his education in regular education on November 7, 1989 or after the November 30, 1989 staffing, in special education pursuant to the IEP.

[redacted] remained home with his parents' consent, but not Weld Boces. The hearing officer directed Weld Boces as an act of good faith to send work home pending review of this matter. [redacted] assert that homework was discontinued November 30, 1989 in response to their refusal to accept the IEP written that day. This dispute actually arose November 7, 1989, when [redacted] was suspended. Thereafter some but not all of [redacted] teachers sent work home pending the staffing. It is clear that [redacted] had not precluded [redacted] return to school because [redacted] and [redacted] participated in the assessment as late as November 27, 1990. It was the [redacted] family who objected to any placement at Weld Central, whether regular or special classes, not Weld Boces.

When the November 30, 1989 staffing was unable to resolve the dispute Weld Boces discontinued homework and asserted their claim that [redacted] needed to return to school.

While [redacted] requested a Due Process Hearing December 5, 1989 to resolve the question of placement, no school at all with only partial homework assignments is not an appropriate placement for [redacted] or for any child.

PROCEDURAL DUE PROCESS

[redacted] asserted that procedures were violated when Weld Boces failed to notify them of the name of the Hearing Officer selected within ten days, to exchange documents at least five days prior to the Due Process Hearing January 22, 1989, to complete the Due Process Hearing within forty-five days, to notify who would attend the staffing, and denial of access for a few days to specific documents in [redacted] file. No other violations were asserted. Nevertheless, procedures mandated by Board of Education vs. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982) to insure an adequate IEP will be reviewed with issue one.

The motion to dismiss was sustained.

Weld Boces in fact did fail to notify [redacted] timely of the final selection of a hearing officer. Furthermore, due to administrative confusion the Hearing Officer was not aware of the selection until January 2, 1990. Nevertheless, the Hearing Officer did offer to conduct the Hearing so that a final decision could be mailed on or before the forty-fifth day. Weld Boces and [redacted] entered into a written agreement, document attached to extend the hearing until January 22, 1989 with a final decision by January 30, 1990. Weld Boces gained extra time to prepare a defense, [redacted] gained a postponement of the nonattendance action in state court pending the outcome of this hearing, document attached, and [redacted] was able to schedule time off from work more conveniently. When asked if their defense would have been different if they had known who the Hearing Officer was, [redacted] answered, "no."

There was no agreement to waive the five day rule. However, [redacted] was unable to deliver the petitioner's exhibits personally within five days because her car was disabled. The hearing officer advised her to mail them five days prior to the hearing. Petitioner's exhibits were received by respondents January 19, 1990. Weld Boces did tender all exhibits timely except two, Exhibits TTT and WWW. These exhibits were mailed January 16, 1990. January 17, 1990 was the fifth day prior to the Due Process Hearing. The exhibits were received January 18, 1990. The Due Process Hearing was conducted January 22, 1990 and January 26, 1990. [redacted] did state that her objection was to Exhibit WWW and not Exhibit TTT. Exhibit WWW is an actual test given [redacted]. Exhibit L is a summary of the same test. Both are title Burk's Behavior Rating Scale in the list of file documents provided by Respondent. Exhibit L was tendered timely.

It is clear that the objection pertains to the content of Exhibit WWW not its timeliness. Since Burks Behavior Rating Scale as Exhibit L was listed as a document to be entered into evidence, Petitioner can not claim surprise. Moreover, the exhibit was not actually entered into evidence until January 26, 1990, allowing four additional days to prepare a challenge to it. Finally Petitioner's submitted all of their exhibits by mail which was received after the time limit expired. In the interest of equity, it is reasonable to admit two of the Respondent's exhibits tendered in the same manner.

Petitioners who are not represented by counsel have objected several times to the breach of the forty-five day time limit. However, at the Prehearing Hearing January 11, 1990 they signed a waiver and agreement to extend the forty-five day time limit to January 30, 1990, an extension of nine days. The Hearing Officer very carefully read and explained this agreement to [redacted] on the record. This agreement was in exchange for a postponement of the nonattendance hearing. [redacted] was reluctant to agree to any request of Weld Boces. The Hearing Officer acknowledged to [redacted] that undoubtedly Weld Boces' attorneys would benefit from an extension of time. However, [redacted] were encouraged to consider what they might gain from an extension regardless of what the respondents might gain.

[redacted] had repeatedly expressed concern about the effects of the nonattendance hearing on [redacted] stating that he was literally losing hair because of it. Moreover, [redacted] had expressed concern about the loss of two days work close together if the hearing proceeded January 15, 1990 as scheduled. However, the Hearing Officer did assure both [redacted] on the record that they were not required to waive any rights and if they wanted to proceed without delay, the Hearing would go forward as scheduled. Consequently, the waiver and agreement signed by [redacted] January 11, 1990 and the agreement to postpone the nonattendance hearing are valid.

It is correct that the notice of staffing respondent's exhibit H, does not contain the of people who would attend the staffing. Neither [redacted] asserted any harm to them because of this omission and they did not raise this concern at the staffing.

The documents that were not in [redacted] file for a few days were in the office of the attorney for use in preparing for this hearing. They were made available prior to the hearing, however and other than the inconvenience of a few days delay no other harm was asserted by [redacted].

The procedural violations asserted by [redacted] are either without harm or without merit.

ISSUE 4. Did Weld Boces fail to identify [redacted] as handicapped in a timely manner?

[redacted] received special education services prior to fifth grade. For fifth grade he was home schooled and in sixth grade he was in regular education for the entire year. At back-to school night [redacted] advised [redacted] teachers to watch him and kept her

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informed if problems arose. Although [redacted] grades were failing or nearly failing, it was [redacted] who asked that [redacted] be observed. She requested this October 16, 1989. Don Foster, a reasonably credible witness testified that he observed [redacted] for two weeks and referred [redacted] for further assessment. A child study conference was held November 2, 1989 and resulted in a referral for assessment. The parental consent was signed November 13, 1989 and according to the facts stipulated by the parties, the first assessment, a psychological report, was dated November 15, 1989. There were six assessments or reports completed. The latest report was an audiological report dated November 29, 1989. Between October 16, 1989 and November 30, 1989 six weeks elapsed.

This does not seem timely to concerned parents. Furthermore, [redacted] concern relates not only to the six week required for observation and assessment, but also to the fact that she initiated the process and not teachers.

The teachers did apprise [redacted] about [redacted] failing grades early in October, and continuing through mid-November by means of weekly progress reports, See Petitioner's exhibits 69 and 76. [redacted] moved from Hudson Elementary to Weld Central Junior Senior High School when he entered seventh grade. Early October is an appropriate time to advise parents that grades are failing. Concern expressed earlier might be premature. A certain amount of time needs to be given a student to adjust to a new school and new level of expectations inherent in junior high school.

Don Foster observed [redacted] for two weeks and referred him for further assessment. Thus once [redacted] requested that [redacted] be observed, there was an appropriate response. Six weeks to observe and complete six assements is not an extraordinary lapse of time.

ISSUES 1, 2, and 3. These are interrelated and shall be considered together pursuant to the guidelines established by Rowley, supra.

"a court's inquiry in suits brought under 1415 (e) (2) is two-fold. First, has the (school district) complied with the procedures set forth in the act? And second, is the individualized educational program developed through the act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the (school district) has complied with the obligations imposed by Congress and the courts can require no more." Section 1415 of The Education for all Handicapped Children Act (EHA) guarantees procedural safeguards to parents and handicapped children as follows:

Section 1415 (b) (1) (A) of an EHA grants an opportunity for the parent to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a fee appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(c) written prior notice to the parents whenever (a school)
  (i) proposed to initiate or change, or
  (i) refuses to initiate or change,
The identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

Federal regulation 300.500 states that consent means that the parent has been fully informed of all relevant information pertinent to the activity for which consent is sought. It means that the parent understands and agrees in writing to this activity and that the activity is described, and what records, if any, will be released and to whom. The parent understands the consent is voluntary and may be revoked at any time. Colorado Code of Regulation 301-8 2220-R-3.03 at seq. establishes assessment procedures. In addition to the federal requirements, the state requires that the school district give the parents the reasons for assessment with an opportunity for a face-to-face meeting.

The State Plan, VI, 2, additionally requires written notice prior to assessment to include a statement regarding the opportunity for a face-to-face conference and a description of proposed evaluation procedure, test, record or report to be used as a basis for the proposal or refusal.

Respondent's Exhibit D captioned Parental Consent for Evaluation was signed by [redacted] [redacted] November 13, 1989. [redacted] initiated the evaluation.

The consent includes the reason for the evaluation, the parents right to review records, to have an independent evaluation at public expense, to withdraw consent, and it concludes a statement that there will be no change in the child's placement without the parents written permission. What is lacking in Respondent's Exhibit D is a written statement about the opportunity for a face-to-face conference and a description of each procedure, etc. to be used as a basis for the proposal.

Federal Regulation 300.500 describes the content of the mandatory prior written notice when a school district proposes to change the identification, evaluation, or educational placement of a child. The notice must include a full explanation of all the procedural safe guards available to parents, a description of the action proposed or refused by the school district, a description of any options considered and the reasons why those options were rejected. The notice must contain a description of each evaluation procedure, test, etc. used as a basis for the proposal or refusal, and it must contain a description of other factors relevant to the proposal or refusal. The notice must be understandable, and according to the state plan notice must be received ten (10) days prior to the meeting.

1 Colorado Code of Regulation 301-8 2220-R 3.4(4) requires notice to include information that the parents have the right to be represented by counsel or other representative of their choice.

Ex. Respondent's Exhibit H is a letter sent to [redacted]ten (10) days prior to the staffing when a change in identification and placement was proposed. It does inform [redacted]. [redacted] that a staffing will be conducted for their son, the day, the date, the time and the place. It is sent by a counselor who provides his telephone number.

What this letter does not contain is any explanation of the procedural safeguards available to parents, including information about the right to representation, any description of the proposed action nor any description of options considered, any description of evaluation procedures, test records, or reports used as a basis for the proposal.

Respondent's Exhibit I which is a staffing committee report indicates that the parents were notified on an unspecified date by phone and letter by Gay and Haynie. Contained in this document is a comprehensive statement of the parent's procedural rights except the right to representation.

Respondents Exhibit VVV provides [redacted] with a comprehensive explanation of their due process hearing rights. [redacted] stated furthermore, that she had been assisted by the Colorado Department of Education who provided her a copy of the State laws.

Federal regulation 300.504 mandates prior written notice before a school district proposes an action pertaining to a child. The state plan explains that the procedures pertaining to written notice were established to ensure that parents or handicapped children are able to participate in the decision making process.

In the case at hand [redacted]e proposed that action be taken regarding [redacted] She perceived the need for assessment and requested it. While Weld Boces responded to this request, it did not initiate it. Furthermore, [redacted] actively interacted with school personnel at every step in the process. Both [redacted] attended the staffing, refused to agree to a placement and requested a Due Process Hearing. Indeed credible testimony from Pam Traut, the Emotionally Behaviorally Disordered Consultant, indicated that she did not fully discuss her evaluation because [redacted] objected to it. [redacted] has not attended school because his parents have not accepted the recommended placement. This is powerful participation in the decision-making process. The [redacted] have utilized these rights fully.

Nevertheless, there is no documentary or testimonial evidence that indicates that [redacted] were advised in writing in a timely manner that they could be represented by an attorney or other advocate.

After sustaining the motion to dismiss on the procedural violations asserted by [redacted], the Hearing Officer advised Mr. DeLay, Counsel for Weld Boces, that because the [redacted] lacked representation, the Due Process requirements necessary to establish an adequate IEP would need to be proven. The right to representation is a fundamental right and of the highest importance. The school district under the EHA has an obligation to notify parents of this right, among others. It can not be disregarded. This alone constitutes grounds to challenge the adequacy of an IEP. It does not mitigate that [redacted]. [redacted] were provided names of attorneys and an advocate by WELD BOCES and the Hearing Officer for this hearing or that they were unrepresented nevertheless. A hearing and a staffing are separate events with separate rights attached to them.

Respondent's Exhibit I constitutes the IEP proposed for [redacted]. [redacted] challenge this IEP, the social history report, respondent's Exhibit K, the Burk's Behavior Rating Scale, Respondents Exhibit L, The Psychological Report, Respondent's Exhibit M. and the proposed placement at Weld Central Junior/Senior High School. The heart of their challenge, however centers around the allegation that the proposed IEP does not adequately address[redacted] unique needs.

Section 1401 (19) of the EHA and Federal Regulation 300.346 defines the phrase IEP. It is a written statement developed in a meeting with a school district, the teacher, the parents or whenever appropriate the child. The statement shall include a statement of the present levels of educational performance of every child, a statement of annual goals and short term instructional objectives, a statement of the specific educational services to be provided the child, the extent to which the child will be able to participate in regular educational programs, the projected date for beginning and the anticipated length of time for the services, and the appropriate objective criteria, evaluation procedures and schedules for determining at least annually whether instructional objectives are being achieved.

1 Colorado code of Regulations 301-8 2220-R-3.04 et seq. establishes the requirements for a staffing, the functions of a staffing committee and the development of an IEP. The determination that a child is handicapped and the recommendations for services shall be made by a committee of qualified personnel who shall reach consensus in its decision. At a minimum the committee shall be composed of the people who assessed the child and who have pertinent information.

The functions of the committee shall be to assure a comprehensive assessment of sufficient scope and intensity and to determine present levels of functioning and educational needs of the child. It must determine whether the child is unable to receive reasonable benefits from ordinary education due to the child's handicapping condition, priortize and cluster identified needs into annual measurable goals, identify the nature, scope and intensity (characteristics) of instructional and educationally related services and recommend placement in the least restrictive environment. Finally, the staffing committee must within twenty school days develop short-term instructional objectives, and evaluation criteria and the committee must keep accurate records of the proceedings and utilize the proceedings for the development of the IEP.

The IEP must be developed by the special education director or designee the building administrator or designee, the special education teacher who is to have primary responsibility for implementing the IEP, the parent, and the child where appropriate.

There are additional requirements for evaluating a child with specific learning disabilities. They include the child's regular education teacher or a regular education teacher qualified to teach a child of his or her age and at least one person qualified to conduct individual diagnostic examinations of children such as a school psychologist.

A team may determine that the child has a specific learning disability if the child does not achieve commensurate with his age in specific areas such as listening comprehension and written expression when provided with learning experience appropriate for the child's age and ability levels and the team finds a severe discrepancy between achievement and intellectual ability. The severe discrepancy may not be primarily the result of visual, hearing or motor handicap, mental retardation, emotional disturbance or environmental cultural or economic disadvantage.

At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting. The team report must include a statement of the specific learning disability, the basis for the determination, the relevant behavior noted during observation, the relationship of that behavior to the child's academic functioning, the educationally relevant medical findings, whether the severe discrepancy is not correctable without special education and related services, and the determination by the team concerning the effects of environmental, cultural, or economic disadvantages. The team shall certify in writing whether the report reflects his or her conclusion. If not the person must submit separate statements of his or her conclusions.

Respondents Exhibit I is the IEP written November 30, 1989. It is signed by the principal, the special education teacher, the psychologist, the director of special education, both parents, the student, the counselor, the EB/D consultant, the OT/PT, the person who assessed vision, and four other people including the audiologist, a science teacher, and [redacted] former special education teacher. All these people agreed with the IEP except [redacted] [redacted]e and [redacted]. There is a lengthy discussion of the current level of functioning on page 2 of Exhibit I. There are three annual goals listed but there are no short term objectives. However, the was testimony from Dr. Schmidli who was a very credible witness that within twenty days of placement short term goals would be written. The specific special education services were written on page 6 of Exhibit I as well as the extent of participation in regular education. For each goal listed on page 4 there is a statement that the length of time of the service was until May, 1990 less than a year from the possible beginning date. Each goal has objective criteria or procedures to determine if the objectives are being achieved.

The assessment is stated to be of sufficient scope and intensity on page 1, [redacted] is determined to be unable to receive reasonable benefit from regular education on page 3, characteristics of services are contained on page 5, and the recommended placement on page 6. Respondent's Exhibit I is a record of the proceedings wherein the IEP was developed. The necessary characteristics for an EH placement are described in Respondent's Exhibit SSS and parallels the characteristics of a learning disabled student.

Dr. Schmidli explicitly stated that in identifying an EH student, emotional disturbances was excluded as a primary problem. Moreover, environmental, cultural or economic disadvantage have been discussed on Page 3 of Exhibit L. There was a regular education teacher who participated in the staffing, a science teacher. [redacted] was observed for two weeks by Don Foster who was not his regular education teacher. The specific handicapping condition is educationally handicapped. This is not a proper handicap under the act or state law. However, there is a determination of severe discrepancy nonetheless on page 3.

[redacted] vigorously objected to the social, psychological and behavioral evaluations. Pam Traut, an EBD consultant, administered the Burk's Behavior Rating Scale (BBRS), Exhibits WWW and L. Ms. Traut was a knowledgeable and thoughtful witness. She was impressive and highly credible.

Of particular concern to [redacted] was the characterization of [redacted] as anti-social, aggressive, and having poor anger control, and that were called "excessive"

BBRS has one hundred and ten questions concerning behaviors. These behaviors are rated from "not noticed at all" to "noticed to a very large degree". This is a standardized test utilized in different states, different school districts and numerous evaluations. All test subjects like [redacted] would be evaluated with the same questions and the same rating scale. There are nineteen categories of behavior including "excessive self-blame," "excessive anxiety," "poor ego strength," "poor anger control," etc. There is a test mannual with specific directions for calculating the scores. On every test administered the same answer would be rated with the same score. Nearly half of the categories of behavior were rated as "not significant" based on [redacted] answers to questions about [redacted]. In the same manner ten catagories were rated as "significant" and one category, "poor anger control," was rated "very significant". Descriptions like "excessive", "anti social", and "poor anger control" are the descriptions of the publisher of the test and are based on the descriptions of the test subject by those close to him or her. It was [redacted] who described [redacted]. They are not the words or thoughts of the person administering the test.

It is clear that [redacted] were offended with the messenger because they did not like the massage that was delivered. They are upset with the test and the testor because of the results. However, in an unsophisticated and untutored manner, the objection to this test also is to its validity and reliability which is a valid objection.

The testimony that [redacted] picks at his skin to the point where he has marks, that he pulls out his hair, that he hits his head against lockers and that he has poor peer relations support the results of this test. This objection is not supported by credible evidence.

The objection to the social report was that it made reference to [redacted] opinion about [redacted] when [redacted] did not participate in the social history. He was not home when the interview ocurred. [redacted] particularly objected to the statement in Exhibit K that he did not want [redacted] to return to Weld Central. The direct quote from the report is "Mother stated the parents and [redacted] do no want him to return to Weld Central." It is stated in the second sentence of this report that [redacted] was interviewed and this quote clearly identifies the statement as being from [redacted] mother. [redacted] has never indicated in any testimony or at the IEP staffing November 30, 1989 that [redacted] opinion that he did not want [redacted] to attend Weld Central was in fact wrong. Indeed the opinion stated is true. The objection to the social report is not adequate to discredit it.

One bases for objection to the Psychological Report was that it was not typed in time for the November 30, 1989 staffing and that the date stated that [redacted] did not attend school was wrong, instead of 1988-89 school year, the correct year was 1987-88. This information was corrected and the correct report was given to [redacted].

Nevertheless, at the November 30, 1989 staffing the psychological information provided was from hand written notes. And verbal statement from the evaluation.

Another basis for challenge was that [redacted] questioned the statement that [redacted] "Wanted to play his keyboard in the testing room. . . " and that [redacted] discussed attending the accelerated school". [redacted] questioned the significance of [redacted] wanting to play the keyboard and the accuracy of the statement that he wanted to attend an accelerated school.

This kind of objection does not discredit the objective test results and their use in the staffing. Furthermore, [redacted] do not object to the first paragraph in the summary about [redacted] being "bright and personable."

These challenges are not sufficient to support an objection to the validity of this report and its use in the staffing.

The crux of the [redacted] objection to the IEP is that it does not take into consideration the information in Respondent's Exhibits M, and Petitioners Exhibit 79 and 80, and other documents that [redacted] is "bright" and according to [redacted] "gifted." His unique needs, they have stated require attention not only to the negative information about his behavior and lack of social skills but also to positive information about his abilities.

The concern is that many of his negative behaviors are the result of a lack of attention to his abilities.

[redacted] are concerned because [redacted] performance on the Woodcock Johnson, Respondents Exhibit G and V in the area of reading fell from twelfth grade to ninth grade in two years.

Kathy Simmons an E.H. teacher who was an articulate, professional and highly credible witness identified several possible reasons for this. The drop could be the result of missing fifth grade or the deemphasis in sixth grade on phonics and more emphasis on silent reading. There was testimony also that [redacted] did not have his glasses for the testing. [redacted] did not offer an explanation for this concern. Possible reasons are myriad. The school district has not been shown to be at fault.

Ms. Simmons did testify that [redacted] needs were not academic, he is performing at or above grade level and is above average in reading and knowledge. His problems pertain to his behavior. He needs to work on social skills and getting along with his peers she said.

Both Ms. Simmons and Ms. Traut strongly asserted that [redacted] needs to remain at Weld Central and not change schools. The testimony from both witnesses was that repeatedly changing schools rather than learning to deal with entrenched problems could lead to manipulative behavior. This was viewed as a serious problem for [redacted].

Moreover, there was testimony that [redacted] had changed schools and had been home schooled, and yet the same problem behaviors persisted.

There was testimony that a behavior alert which is a file note reflecting a concern about [redacted] had been written at the end of sixth grade, that the parents had not been notified and that it was not in the records provided in October to the parents in this case. In light of the quick response to [redacted] concerns, this concern is moot.

[redacted]would like [redacted] to have a fresh start at a different school which has a gifted program. They introduced a letter, Petitioner's Exhibit 57, written by Dr. Jeffery McClure who has been counselling [redacted] since December which supports the request for a "fresh start." This opinion however is qualified in part by the statement that it is based on "information presented to me." Dr. McClure has not worked with [redacted] very long and he does not have important information from [redacted] teachers.

[redacted] and their daughter [redacted] gave testimony. There are clearly a close and caring family. [redacted] was intelligent and alert in the presentation of testimony, cross examination, and identification of issues important to their case. [redacted] demonstrated affection for his family and respect for [redacted] teacher and the school district. It must be noted, however, that several times when he was unable to articulate his thoughts well or was unable to understand quickly, [redacted] became frustrated and started to rush out of the proceedings. This occurred several times. Each time, however, he did respond to the request to continue the proceedings. He was very cooperative and did make important contributions to the Petitioner's presentation, cross examination and closing statements. [redacted]e was perceptive and serious, and she gave valuable testimony. All of the [redacted] appeared to be honest and credible. They were well able to present their case and represent their point of view.

It is clear that the school district did fail to advise [redacted] about their right to representation at the IEP staffing.

In all other issues and concerns The evidence is overwhelming in the favor of the school district. The IEP and recommended placement could provide at least a minimum educational benefit. Indeed, it is likely that the IEP and recommended placement would do far more. There were sound reasons for designing a program for [redacted]at Weld Central. A fresh start could easily be a false start if [redacted] basic problems are not addressed. He is a bright young man, but by focusing on his abilities without attempting to help him solve his problems, the pressure on him is increased not decreased. This is like trying to drive a car with excellent tires and expecting a good ride when one tire is flat. The flat tire needs to be mended before it is reasonable to expect good performance. Moreover, the purpose of special services is to address the special needs identified by the act. Giftedness does not fall within its scope. Regular Education classes are part of [redacted] IEP. This would be an excellent place to provide art, music and other enrichments.

There is however one troubling aspect concerning [redacted] handicapping condition. EH does not exist in the EHA. It woud be preferable that the name for handicapping condition conform to those listed in the EHA and state law.

In fact this is a classification which parallels learning disabled which is sufficient in this case to support its use.

Weld Boces must correct its notices to include advising parents that they are entittled to have representation such as an attorney or parent advocate in any meeting under the EHA.

It is expected further that this will be remedied with reference to the [redacted] when the meeting to construct short term objectives for [redacted] is convened.

This procedural violation is not sufficient to invalidate the IEP for several reasons. First, the equities in this situation are with Weld Boces, despite their caring motives, [redacted] are absolutely wrong to keep [redacted] home from school. Parents are strong role models for their children for bright children even more so. The message sent, despite good intentions, is one of defiance of authority, and avoidance of one's problems. Furthermore, this underscores [redacted] feelings of isolation and lack of connection to his peers. It certainly is not helpful and despite the concerns about [redacted] being hassled at school, to keep him home. This can be far more harmful than any concern stated.

Second, [redacted] participated vigorously and effectively at every stage in these proceedings. Depending on the attorney or advocate, it is not certain that more could have bee done to help them. Indeed, they were given wide latitude in presenting their case and in admitting their documentation in difference to the fact that they were not attorneys. This may have been in fact to their advantage.

It is hoped that [redacted] will convene the follow up meeting to establish short term objectives and to try to work with Weld Boces for [redacted] benefit.

Elizabeth B. Kolkoski

Elizabeth B. Kolkoski
Hearing Officer

WAIVER AND AGREEMENT

This Waiver entered into this 11 day of January, 1990 is among [redacted] [redacted], [redacted], [redacted], [redacted] [redacted] ([redacted]) and the Weld BOCES ,P.O. Box 518, 204 Main Street, La Salle, Colorado 80645 ("BOCES") and Elizabeth Banks Kolkoski, 2468 S. Evanston Street, Aurora, Colorado 80014 ("Hearing Officer").

WITNESSETH:

WHEREAS, the parties hereto are engaged in a due process hearing pursuant to the Colorado 1989-1991 State Plan, under Part B of the Education of the Handicapped Act as amended by Public Law 94-142 (the "State Plan"); and

WHEREAS, Article VII Impartial Due Process Hearing B, 2 Due Process hearing provides in part that "the hearing officer shall establish timelines which shall ensure a decision is reached and mailed to each of the parties within 45 days after receipt of the request for hearing"; and

WHEREAS, the parties hereto desire to waive such 45 day requirement.

NOW THEREFORE, in consideration of the premises the parties hereto agree to waive such 45 day requirement. The parties hereto agree to a hearing date of January 22, 1990. and a decision rendered and mailed to the parties no later than January 30, 1990.

IN WITNESS WHEREOF, the parties hereto have executed this Waiver as of the date first above written.

[redacted]

[redacted]

Margaret Sickel
Margaret Sickel, Attorney
for Weld BOCES

Elizabeth B. Kolkoski
Elizabeth Kolkoski

PBJC [illegible] (4)

and Weld Central Re-3J

The Weld Boces hereby agree~~s~~ KA to postpone the nonattendance hearing filed with the Weld County District Court until such time as a ruling is made in connection with the due process hearing to be held on Jan 22, 19 such ruling to be rendered and mailed on or prior to Jan. 30, 1990.

Margaret Diehl
attorney for Weld Boces and Weld Central R-3
Jan 11, 1990

Elizabeth B. Kolkoski
WITNESS 1/11/90

Mary J. Harms, 1/11/90
WITNESS

Kenneth A. DeLay
Attorney for Weld BOCES
and Weld Central Re-3J

[redacted]

APPEAL RIGHTS

Either party may appeal the decision of the impartial hearing officer to the Colorado Department of Education within (30) days after receipt of the decision. Such appeal decision shall be communicated to the other party at the last address furnished by that party.

If there is no appeal, the decision of the hearing officer if final.

[redacted]

Weld Boces
P.O. Box 578
204 Main Street
La Salle, CO 80645
(303) 284-6975

Kenneth A. DeLay, Attorney
Margaret Sickel, Attorney
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(303) 321-2903

BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. [redacted] S89:103

DECISION UPON STATE LEVEL REVIEW

[redacted], **through his parents,**
[redacted] **and** [redacted],

Petitioners,

v.

WELD BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Respondent.

On January 22 and 26, 1990, a due process hearing was held in this matter before an impartial hearing officer pursuant to the Education for All Handicapped Children Act (20 U.S.C. Section 1400 *et seq.*, "the Act") and Part II, Section VII.B.4 of Colorado's State Plan.[1] The central issue at this hearing was whether the Board of Cooperative Educational Services ("BOCES"), on behalf of the Keenesburg School District RE-3J, offered Petitioner [redacted] a free appropriate public education. On approximately February 5, 1990, the impartial hearing officer issued a decision in which she found that [redacted] had received a free appropriate public education as required by state and federal law.

By letter dated February 6, 1990, the petitioners sought a state level review of that decision by the Colorado Department of Education.[2]

On February 11, 1990, the Colorado Department of Education requested the appointment of an Administrative Law Judge from the Colorado Department of Administration to conduct the state level review. Pursuant to the State Plan, Part II, Section VII.B.4.c, written argument was submitted on February 22, 1990, and oral argument was also heard telephonically on that date. Additional oral argument was heard telephonically on March 13, 1990, at the request of the Administrative Law Judge.

PRELIMINARY MATTERS

On the state level review, the Administrative Law Judge may consider additional evidence if needed. The Petitioners did not seek to present additional testimony but did seek to have admitted additional documentary evidence in the form of a one-page EBD

Case Number: S89:103

Status: State Level Review

Key Topics:
Free Appropriate Public Education (FAPE)
Individualized Educational Plan (IEP)
Assessments
Stay-Put Provision
Scope of Review
Short Term Instructional Objectives

Issues:

- Was student offered a FAPE by district including an adequate IEP and an appropriate placement based on adequate evaluations?
- Was stay-put provision violated?
- Was procedure at local hearing in accordance with due process requirements?

Decision:

- District failed to provide student with FAPE by failing to include short term instructional objectives in his IEP within 20 days of the IEP staffing.
- Student was offered an appropriate placement.
- Assessments were not inaccurate or inappropriate.
- Stay-put provisions not violated during pendency of proceedings.

Discussion:

- Tracks child's educational history, various assessments, assessment requests and IEP development.
- Appropriateness of IHO's handling of hearing in view of the fact that parents were *pro se.*
- *Rowley* standards.
- Specific contents of IEP.
- Work being sent home for student did not make home school the student's current educational placement.
- Purpose of stay-put provision to guard status quo.

BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. [redacted] S89:103

DECISION UPON STATE LEVEL REVIEW

[redacted], **through his parents,**
[redacted] **and** [redacted],

Petitioners,

v.

WELD BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Respondent.

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PRELIMINARY MATTERS

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BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. [redacted] S89:103

DECISION UPON STATE LEVEL REVIEW

[redacted], **through his parents,**
[redacted] **and** [redacted],

Petitioners,

v.

WELD BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Respondent.

On January 22 and 26, 1990, a due process hearing was held in this matter before an impartial hearing officer pursuant to the Education for All Handicapped Children Act (20 U.S.C. Section 1400 et seq., "the Act") and Part II, Section VII.B.4 of Colorado's State Plan.[1] The central issue at this hearing was whether the Board of Cooperative Educational Services ("BOCES"), on behalf of the Keenesburg School District RE-3J, offered Petitioner [redacted] a free appropriate public education. On approximately February 5, 1990, the impartial hearing officer issued a decision in which she found that [redacted] had received a free appropriate public education as required by state and federal law.

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PRELIMINARY MATTERS

On the state level review, the Administrative Law Judge may consider additional evidence if needed. The Petitioners did not seek to present additional testimony but did seek to have admitted additional documentary evidence in the form of a one-page ESD

Alert. The Respondent objects to the admission of this document based on its relevancy and on the fact of its prior availability. There was testimony at hearing regarding the EED Alert. The document itself was available at that time and was not offered into evidence. The testimony regarding this document is sufficient to establish any of its underlying facts. In addition, this document is only relevant regarding the issue of the timeliness of Respondent's identification of [redacted] as handicapped, an issue not pursued on appeal. The Administrative Law Judge thus excludes the offered additional documentary evidence and has thus considered no evidence outside of the record in the state level review.

ISSUES

Six issues were identified by the parties and addressed by the decision of the impartial hearing officer in the due process hearing. These issues are as follows: (1) Did Weld BOCES provide Brian an inadequate individualized education program (IEP)? (2) Did Weld BOCES offer a placement for [redacted] which was appropriate? (3) Did Weld BOCES utilize inadequate or inappropriate social, psychological or behavioral evaluations in [redacted] IEP or placement recommendations? (4) Did Weld BOCES fail to identify [redacted] as handicapped in a timely manner? (5) Did Weld BOCES violate Section 1415(e)(3) of the Education for the Handicapped Children's Act, which requires that during the pendency of any proceeding conducted pursuant to this section, unless otherwise agreed, the child shall remain in the then current educational placement until all such proceedings have been completed, by Weld BOCES' failure to send Brian homework after the [redacted] requested a due process hearing? (6) Did Weld BOCES violate the [redacted] due process rights? While the Petitioners originally indicated that they wished to appeal all six issues addressed at hearing, they later limited the scope of their appeal to issues 1, 2, 3 and 5 and specifically indicated that they were satisfied with the impartial hearing officer's decision regarding issues 4 and 6.

In addition, pursuant to the State Plan, Part II, Section VII.B.4.b, the Administrative Law Judge must determine and assure that the hearing procedure was in accordance with the requirements of due process. Neither party asserts any due process violation at the hearing.

The issues on state level review are thus as follows: (1) Did [redacted] receive a free appropriate public education including an adequate individualized educational program ("IEP") and an appropriate placement based on adequate social, psychological and behavioral evaluations? (2) Did the BOCES violate the stay-put provision of Act? (3) Was the procedure at the due process hearing in accordance with due process requirements?

SCOPE OF REVIEW

The parties did not extensively argue the issue of the scope of the Administrative Law Judge's review, but both agree that the impartial hearing officer's findings must be supported by the record. The Administrative Law Judge does not consider the decision below to be binding and believes that independent factual determinations may be made, giving due deference to the findings of the impartial hearing officer. The Administrative Law Judge must exercise discretion in giving appropriate weight to these findings. Town of Burlington v. Department of Education for the Commonwealth of Massachusetts, 736 F.2d 773, 791-92 (1st Cir. 1984); see Age v. Bullitt County Public Schools, 673 F.2d 141 (6th Cir. 1982). As to ultimate facts,[1] such as whether [redacted] received a free appropriate public education, the Administrative Law Judge is clearly not bound by the decision below. Any contrary interpretation would render a state level review meaningless.

The facts set forth below thus consist largely of uncontested evidentiary facts revealed by the record and, in most cases, found or implied in the decision of the impartial hearing officer. To the extent that it was necessary to make findings from conflicting evidence, the Administrative Law Judge has made independent findings based on the record, giving due consideration to any findings of the impartial hearing officer. Findings of fact are made only in relation to those issues raised on state level review.

FINDINGS OF FACT

Petitioner [redacted] was born on July 1, 1977, and is now 12 1/2 years old. [redacted] is a bright and creative boy with mild central auditory processing and visual motor integration difficulties. [redacted] needs glasses to correct a vision problem. [redacted] also exhibits moderate behavior problems in school. He is disruptive in the classroom, flares up at his classmates if teased or pushed, explodes under stress, angers quickly and frustrates easily. [redacted] engages in some self-abusive behaviors such as picking at the skin on his arms and the resulting scabs, pulling out his hair, and on one occasion hitting his head against a locker. Further, [redacted] makes unusual noises during school, such as imitating Donald Duck. [redacted] is resistive to authority and has difficulty taking directions from staff. [redacted] has also been disciplined for fighting. [redacted] has difficulty relating appropriately to his peers or taking responsibility for his actions.

Prior to the 1989-90 school year in question, [redacted] has been in both regular educational programs and special educational programs. In third and fourth grades (1985-86 and 1986-87), [redacted] received special education services. At the end of fourth grade, a special education placement was recommended for [redacted]. Petitioners rejected this placement and, during 1987-88, [redacted] was educated at home. During the sixth grade (1988-89), [redacted] was enrolled exclusively in the regular educational program at Hudson Elementary. Hudson Elementary ends with the sixth grade.

[redacted] began seventh grade at Weld Central Junior/Senior High School ("Weld Central") in the 1989-90 school year as a regular education student. When [redacted] mid-term grades were received on September 30, 1989, they were all either failing or near failing. Spurred by her concern regarding her son's school performance, [redacted] requested and received weekly status reports regarding Brian. In addition, on October 16, 1989, [redacted] telephoned Don Foster, a Weld Central special education teacher who works with seventh and eighth graders, and requested that he observe [redacted] to determine whether [redacted] needed special education services. For approximately two weeks, Mr. Foster did observe [redacted] at school in the hallways, classrooms, the lunchroom and various social settings. Mr. Foster noted that [redacted] presence in a group of students created increased turmoil and was disruptive. He also observed [redacted] having trouble with social skills with other students, including picking, pushing and needling with other students.

On October 25, 1989, [redacted] was suspended for one-half day based on a fight in the school lunchroom. On November 3, 1989, Weld Central issued a notice suspending [redacted] for one day (i.e. November 6, 1989), again due to a lunchroom fight. After the November 6, 1989 suspension, [redacted] did not return to Weld Central to attend classes. Petitioners agreed to have [redacted] stay at home, but Respondent never consented to this educational arrangement.

On November 3, 1989, a child study conference was conducted for [redacted]. The result of this conference was a referral for special education testing and assessment. On November 13, 1989, [redacted] signed a parental consent for evaluation form reflecting her consent to her son's being evaluated.

In the second half of November, 1989, six evaluations were performed regarding [redacted]: (1) an audiological report by Kim Miller dated November 29, 1989; (2) a social history by Nancy Sarchet dated November 27, 1989; (3) the Burk's Behavior Rating Scale by Pam Traut dated November 27, 1989; (4) a psychological report by Beth Gay dated November 15, 1989; (5) an occupational therapy assessment by Cheri Benton dated November 17, 1989; and (6) a vision evaluation report by Nancy Wood dated November 22, 1989.

As reflected on the Woodcock-Johnson Psycho-Educational Battery, [redacted] level of achievement in all areas tested was at or above grade level. [redacted] did drop from a twelfth-grade reading level as exhibited on a similar test administered while he was in the fourth grade (1987) to a ninth grade reading level. [redacted] achievement level for reading was nonetheless above grade level. Based on these achievement levels, [redacted] does not exhibit academic needs for placement. As reflected in the audiological report, [redacted] has a mild central auditory processing problem. [redacted] does not have adequate ability to block out irrelevant auditory stimuli and thus needs certain accommodations in order to address his being distracted.

The Burks' Behavior Rating Scale reflects that [redacted] has poor anger control to a "very significant degree," i.e. significant enough to warrant being addressed. The report reflects information almost exclusively from [redacted] during a home visit. In response to 110 questions, [redacted] was asked to rate [redacted] behaviors. The evaluator, Ms. Traut, then calculated applicable scores based on specific instructions in a test manual. No information was provided by [redacted]. By stating that both [redacted] do not want [redacted] to attend Weld Central, Ms. Traut accurately reflected [redacted] opinion, shared by her husband, about an appropriate placement for [redacted].

The psychological report prepared by Beth Gay consisted of a session with [redacted], including the administration of certain tests, and teacher interviews. The report relays certain information as coming from [redacted]. It also contains the evaluator's professional judgments concerning [redacted] and his needs. There is no evidence that the psychological evaluation was not thoroughly discussed at the IEP staffing.

The social history consisted of an interview with [redacted] and [redacted] in their home in order to determine how [redacted] was functioning at home and what his specific needs were according to his parents. The report relays information obtained from [redacted] and also reflects the evaluator's professional judgments based on the information obtained.

All six evaluations were used at an IEP staffing held on November 30, 1989. At that time, the psychological report was only handwritten. Petitioners were allowed to review the handwritten report at the IEP staffing and Beth Gay, the evaluator, participated in the staffing. The staff attending the IEP staffing determined that [redacted] needed special education services to benefit from the educational program. The staffing thus resulted in a recommendation of an IEP for [redacted] including four periods of regular education and three periods of special education services per day. The IEP further reflected that [redacted] regular education teachers would be selected to ensure his success in their classrooms. The IEP identified [redacted] as educationally handicapped ("EH"), a service category encompassing those students of average or above average intelligence who are not progressing academically due to interfering learning disabilities or mild or moderate emotional/behavioral problems. The designation of EH was addressed by several of Respondent's witnesses and is included in the Respondent's Special Education Plan. The emotional and behavioral problems encompassed within this service category are less severe

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than the category of Emotionally/Behaviorally Disturbed. Thus, instead of a self-contained special education classroom, EH students receive a resource program. EH is thus less restrictive. [redacted] was placed in EH by "professional judgment" because his learning disability itself was insufficiently severe to warrant special education services. When coupled with his behavioral problems, however, the staff believed in its professional judgment that this placement was warranted. The alternatives of home schooling and a private accelerated school in Denver were discussed at the IEP staffing. The recommended placement, however, is the least restrictive one where services can be provided to meet [redacted] needs.

The IEP identifies Brian's needs, including his behavior needs. These include his organizational skills, completion of assignments, improved test taking skills, improved peer interactions, extra time to complete paper pencil tasks and in taking tests, improved home-school communications, improved anger control and self-esteem, consistent expectations and consequences, and regular feedback and progress checks. In addition, certain needs were recognized based on [redacted] central auditory processing problem, including the development of compensation for the problem, preferential seating, reduced background noise in the classroom, and a small classroom. The IEP further addresses [redacted] strengths by identifying the needs of increased opportunities in areas of strength and of being challenged as appropriate in all academic areas.

Pursuant to BOCES' policy, short term instructional objectives implementing the IEP are written within 20 days after the IEP staffing by the designated special education teacher. These objectives set forth small, incremental steps to reach the goals reflected on the IEP. Objectives are not written at the IEP staffing. The objectives are written after the placement begins based on the special education teacher's actual experience with the student. Since no special education placement was ever commenced for [redacted], no short term instructional goals were ever developed.

The IEP form used for [redacted] contains a section for specific services needed. While EH services of 15 hours per week by Mr. Foster are specified, the columns reflecting the entry and ending dates for these services were left blank. The specified annual goals are to be achieved by May, 1990. In this context, it is reasonably inferable that services are to be provided until at least that time. Dr. Losee's letter of November 30, 1989, described below, also clarifies that services are to begin immediately.

The Petitioners did not approve of the IEP development on November 30, 1989. On December 5, 1989, they requested a due process hearing.

For approximately three weeks in November, 1989, [redacted] received make-up homework from three teachers. These make-up homework assignments were for social studies, English and math. No homework assignments were sent home for music, science lab or physical education. By letter dated November 30, 1989, Dr. Suzanne Losee, Principal of Weld Central, informed Petitioners that homework would no longer be provided to [redacted] in that [redacted] was not hospitalized or suffering a prolonged illness and was thus not eligible for homebound instructional service. Dr. Losee did indicate that Brian was welcome to return to Weld Central immediately.

The record contains no evidence of any recent evaluations regarding [redacted] other than the six performed in November, 1989, in anticipation of the IEP staffing. At the IEP staffing, however, Petitioners did present letters from Drs. Kohn and McClure recommending that [redacted] continued education be at a school other than Weld Central. Dr. Mary Kohn is a physician who performed a full physical examination on [redacted] in December, 1989. Dr. Kohn concluded that [redacted] was in good health and that he was experiencing hair loss as a result of emotional stress. Dr. Kohn recommends [redacted] placement at a new school based on stress exhibited by him as the result of incidents at Weld Central.

Dr. Jeffrey McClure also recommended in letter form that [redacted] educational program not be provided at Weld Central. Dr. McClure is a mental health professional who had been seeing [redacted] for slightly over one month at the time of the hearing. [redacted] was seen by him based on symptoms of stress. Dr. McClure's recommendation is based on his limited observations and the information conveyed to him by Petitioners.

While [redacted] was attending Weld Central (i.e. from the beginning of the 1989-90 school year through November 3, 1989), he was involved in some minor skirmishes with other Weld Central students. In addition to the two incidents of fighting which led to his suspensions, [redacted] was involved in three incidents on the school bus. These involved situations where [redacted] fought back when some high school students wanted to take his place or when his belongings were taken and he was involved in a scuffle. [redacted] has also been called named by other students. In addition, following his discontinuation of attendance at Weld Central, he was involved in an altercation with Weld Central students at a roller skating rink.

[redacted] has experienced behavioral problems similar to those he is now exhibiting since preschool. If [redacted] educational placement were at a school other than Weld Central, as desired by Petitioners, it is reasonably foreseeable that the same behavioral problems currently being exhibited would reappear. While an educational placement at a new school would probably result in a temporary reduction in behavioral problems, such a change would reinforce manipulative behavior and would have a detrimental effect on [redacted] forming attachments with his peers, an area of need. It would also detrimentally affect [redacted] acceptance of responsibility for his actions, facing his problems, and carrying through to a satisfactory outcome, another identified need for [redacted].

The record contains no evidence to support Petitioners' assertion that [redacted] is gifted or that [redacted] behavior is caused by his being bright and frustrated. Even if such evidence existed in the record, it would not alter the propriety of the IEP, since the same behavioral needs would nonetheless need to be addressed.

Petitioners were not represented at hearing by counsel or by any persons with special knowledge or training in the area of the problems of handicapped children. In recognition of Petitioners' lack of legal training and expertise, the impartial hearing officer developed for Petitioners an outline of the hearing procedures. The impartial hearing officer also afforded the Petitioners great latitude in formulating their questions to witnesses and in proceeding jointly to represent themselves. She offered assistance in formulating questions, asked questions herself to elicit information supporting Petitioners' positions, explained evidentiary rules, directed Petitioners to be particularly attentive to various matters, reminded Petitioners of the appropriate time to assert an objection previously raised in an untimely fashion, instructed Petitioners repeatedly to take their time, and inquired of Petitioners if they understood her rulings and various hearing procedures. The impartial hearing officer's rulings at hearing evidenced that both parties were afforded a full and fair opportunity to litigate the issues. While the impartial hearing officer did acknowledge engaging in telephone conversations with one party outside the presence of the other, the record does not establish the matters discussed and thus does not establish improper ex parte communications.

DISCUSSION

I. Free Appropriate Public Education.

The Act requires that handicapped students receive a free appropriate public education. 20 U.S.C. Section 1401 et seq. In Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176 (1982) ("Rowley"), the United States Supreme Court outlined the minimum requirements that a handicapped student must have: (1) access to specialized instruction and related services [as defined in 20 U.S.C. Section 1401(16) and (17)]; (2) which are individually designed; (3) to provide educational benefit to the student. Rowley, supra at 201. Rowley established that if a state educational agency complies with the procedures of the Act, and if the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefits, the state has complied with the Act.

Rowley, supra at 206-07; see also Cain v. Yukon Public Schools, District I-27, 775 F.2d 15 (10th Cir. 1985). No particular form of education is mandated by the Act nor is the school district required to guarantee the success of the program. 34 C.F.R. Section 300.349 and comment. A school district is required to provide an appropriate education but is not required to maximize educational opportunity or to provide the best possible education. Rowley, supra at 198-200; Cain v. Yukon Public Schools, District I-27, supra; Lunceford v. District of Columbia Board of Education, 745 F.2d 1577, 1583 (D.C. Cir. 1984); Hessler v. State Board of Education of Maryland, 700 F.2d 134 (4th Cir. 1983). Petitioners' specific assertions of a denial of a free appropriate public education must be analyzed against this legal framework.

A. Adequacy of the IEP. Petitioners assert that the IEP developed for [redacted] on November 30, 1989, is inadequate because it does not delineate short term instructional objectives; no alternative placements were discussed; entry and ending dates for services were left blank; [redacted] regular education teachers were not specified; no written psychological report was available at the staffing and the psychological evaluation was not thoroughly discussed; the effects of environment, culture and/or economics were not discussed; and [redacted] strengths were not the focus of the IEP staffing. The Act and the State Plan set forth numerous requirements for IEPs. 20 U.S.C. Section 1401 (19); 34 C.F.R. §300.346; State Plan, Part II, Section V.E.2.f. No requirement appears, however, that the effects of environment, culture and/or economics be discussed; that regular education teachers be specified; or that all evaluations be reduced to writing prior to the IEP staffing. Petitioners' assertions to the contrary are thus without merit. In addition, any inconvenience suffered by Petitioners due to the lack of a written psychological evaluation at the IEP staffing was overcome by their ability to review the handwritten evaluation and to direct any inquiries to Beth Gay, the evaluator. The record does not reflect that Petitioners sought to discuss the psychological assessment at the IEP hearing but were somehow thwarted in their attempt.

Pursuant to the Act, the IEP staffing committee must, however, consider all possible alternative placements where the services may be provided. Placement in the least restrictive environment must be recommended. State Plan, Part II, Section V.E.2.f.(13). The record reflects that both home schooling and an accelerated private school were discussed at the IEP but that the recommended placement is the least restrictive appropriate placement.

The IEP must also contain the projected date for beginning and the anticipated length of time for services. 20 U.S.C. §1401(19); 34 C.F.R. Section 300.346; State Plan, Part II, Section V.E.2.f.(11). This information is omitted on Brian's IEP. These dates do not appear to be the subject of any real controversy, however, and the record as a whole makes it clear that services were to begin immediately and continue until at least May, 1990. Dr. Losee's letter dated November 30, 1989, clarifies any possible misunderstanding regarding the immediate beginning date for services. Since the IEP does set annual goals to be completed by May, 1990, it is also reasonably inferable that the specific services were to be provided until at least that time.

The omission on [redacted] IEP of this information is thus de minimus and no resulting harm has been asserted by Petitioners. See Scituate School Committee v. Todd, 620 F.Supp. 1224 (D.R.I. 1985). A defect such as the omission of then entry and ending dates for services does not invalidate the IEP. The purpose of the IEP is to memorialize the decisions reached at the IEP meeting. Where there is no issue of delay in commencing the services or their premature discontinuation, invalidation of the IEP for this reason would serve no useful purpose.

Petitioners' difficulty in understanding the designation of EH as a handicapping condition also provides no basis for concluding that [redacted] IEP was inadequate. The term "EH" was the subject of testimony of several witnesses and was also addressed in various exhibits.

Petitioners' contention that the IEP was inadequate because it did not focus on [redacted] being a gifted child is also not supported by applicable law. While the record does not establish that [redacted] is gifted, it does establish that he is both bright and creative. The Act, however, does not require the maximization of [redacted] educational opportunity or the provision of the best possible education. It merely mandates that an IEP must be reasonably calculated to enable a student to receive educational benefit. In addition, the IEP does address this issue to some extent by identifying needs of increasing opportunity in areas of strength and of being challenged in all academic areas.

Petitioners also assert the [redacted] IEP is inadequate because it does not contain short term instructional objectives, as required by 20 U.S.C. §1401(19); 34 C.F.R. Section 300.346; State Plan, Part II, Section V.E.2.f(8). Respondent concedes that the IEP developed on November 30, 1989, contains no such objectives but asserts that it has 20 days after the IEP meeting and after the student has actually begun his placement to develop such objectives. In support of its position, Respondent cites its Special Education Plan, p. 22, which provides for the development of short term instructional objectives by the special education staff member ultimately responsible for their implementation. Respondent's plan provides that such objectives may be developed at the time of the IEP staffing or within 10 school days of the staffing.

The State Plan also provides that the staffing committee either develop or assure the development of short term instructional objectives within 20 school days of the IEP staffing. State Plan, Part II, Section V.E.2.F(8). The Act itself does not address the timing of the development of the short term instructional goals in relation to the IEP meeting. It does provide, however, that an IEP must be developed and in effect before special education services may be provided to a child. 34 C.F.R. §300.342(b)(1).

The short term instructional objectives are an integral part of the IEP.[4] While the Respondent had 20 days to develop such objectives following the IEP meeting, it does not follow that a placement can be effectuated prior to the completion of the IEP by the addition of these objections[5] or that Respondent's obligation to develop these objectives is suspended until a placement is commenced. Petitioner's December 5, 1989 objection to the omission of these objectives on the IEP was premature. In this case, however, no objectives were ever developed and thus the course of events gave rise to a valid objection by Petitioners.

Respondent argues that it is impractical to force the development of short term instructional objectives before a placement begins and that thus the State Plan must be interpreted to allow a placement to proceed pending development of these objectives. Such an interpretation results in the undesirable consequences regarding effectuating appeal rights which are exhibited in this proceeding. Since no objectives have been developed, Petitioners have had to pursue their right to a due process hearing and to state level review on all other IEP issues without any indication of what short term instructional objectives will be used to monitor [redacted] progress toward the stated annual goals. If the Petitioners are unsuccessful in obtaining the relief sought, they will be required to submit [redacted] to a placement without any indication of the short term instructional objectives. Once these are written, if Petitioners deem them to be inadequate, they will be obliged to institute a separate due process hearing arising from the same proposed placement of [redacted]. Such a cumbersome, lengthy proceeding should not be read into the Act and the State Plan. On this issue alone, the Respondent has thus failed to provide [redacted] a free appropriate public education by failing to include short term instructional objectives in his IEP within 20 days of the IEP staffing.

B. Recommended Placement. Petitioners do not disagree with the special education placement contained in [redacted] IEP. Rather, Petitioners assert that [redacted] needs simply cannot be met at Weld Central due to the negative environment it presents. Petitioners first assert that the special education program at Weld Central cannot address [redacted] strengths and talents. The Administrative Law Judge has already determined that Respondent is not obligated to provide such services. Second, Petitioners believe that [redacted] needs a "fresh start" in a new school due to the negative interactions he has experienced with some Weld Central students. While Petitioners present evidence to support their position in the form of letters from Drs. Kohn and McClure, this evidence is afforded minimum weight due to the fact that these persons did not testify at hearing and were not subject to cross-examination. The overwhelming evidence at hearing was that [redacted] attendance at a new school would delay the resolution of his behavioral problems and would reinforce undesirable traits. Petitioners' position is thus unsupported by the record.

C. Adequacy of Assessments. The staffing committee must determine that a comprehensive assessment is completed to allow a determination of a child's present level of functioning and his educational needs. State Plan, Part II, Section V.E.2.f. Petitioners argue the inadequacy of three evaluations conducted regarding [redacted]. First, Petitioners contend that the psychological report contains inaccurate judgments by the evaluator. In essence, the Petitioners dispute the professional judgments expressed by the evaluator in her report. Second, Petitioners dispute the evaluator's professional conclusions as reflected in the social report. Third, Petitioners disagree with the opinions expressed by the evaluator in the behavioral report, i.e. Burks' Behavior Rating Scale. Petitioners are particularly concerned that, although this report reflects an opinion actually held by [redacted],[6] that opinion was not expressed directly by him to the evaluator.

Petitioners' objections to the social, psychological and behavioral reports can be summed up as disagreement with the professional judgments expressed by the evaluators therein. To counter the conclusions expressed, Petitioners relayed their own judgments that these conclusions were incorrect. They presented no other evaluations or evidence tending to establish that the reports were inaccurate or inappropriate. The Petitioners' unsupported contrary opinions are insufficient to counteract the weight of the evidence confirming the professional judgments reflected in the evaluations. Petitioners have thus failed to establish that the disputed assessments are inaccurate or inappropriate.

In addition, the remedy sought by Petitioners is not appropriate. Petitioners have the right to seek additional evaluations at Respondent's expense if those obtained by Respondent are inadequate. These evaluations would provide a basis for reaching conclusions other than those contained in the original evaluations. They would not, however, justify rewriting the initial evaluations to delete conclusions or information subsequently disregarded. Petitioners seek not to overturn the educational placement derived using the disputed evaluations but rather to selectively edit the evaluations to delete perceptions which they believe to be inaccurate. This remedy is not available to them.

II. Compliance With Stay-Put Provision.

Section 1415(e)(3) of the Act provides in part that "[d]uring the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian agree otherwise, the child shall remain in the then current educational placement of such child . . . ." Petitioners requested a due process hearing on December 5, 1989, and thus had a right to the continuation of [redacted] then current educational placement during the pendency of these proceedings. The parties clearly did not agree to a placement for [redacted] other than his then current educational placement. Petitioners contend that [redacted] educational placement beginning in November, 1989, was instruction provided by means of Respondent's sending home make-up homework assignments to allow [redacted] schooling at home. Petitioners thus assert that the Respondent's failure to continue providing homework assignments to [redacted] after the IEP staffing violated the above stay-put provision of the Act. The Respondent, on the other hand; asserts that [redacted] current placement was in regular education at Weld Central. Respondent was prepared to continue [redacted] regular educational placement and indeed requested his return to Weld Central.

Petitioners have failed to establish a violation of the stay-put provision. First, the provision of homework assignments to [redacted] during three weeks in November for only three of his classes did not effectuate a change in his educational placement. A change in [redacted] educational placement could not be effectuated by the casual procedure used in sending home partial homework assignments for such a limited time period. The record establishes nothing other than a temporary accommodation by Weld Central to Brian. See Digre v. Roseville Schools Independent District No. 623, 841 F.2d 245 (8th Cir. 1988). The total inadequacy of educating a child by providing only homework and providing it only in selected courses belies any indication that this arrangement constituted a change in [redacted] educational placement.

Second, Petitioners' unilateral decision to keep [redacted] at home and not have him return to school cannot itself give rise to a new educational placement. Respondent never consented to [redacted] staying at home. Petitioners' desire that [redacted] be educated at home is insufficient to determine a new placement. See Stemple v. Board of Education of Prince George's County, 623 F.2d 893 (4th Cir. 1980).

Third, the stay-put provision is designed to preserve the status quo and to guard against attempts by school districts to effectuate changes in placement while persons such as Petitioners exercise their rights. See Honig v. Doe, 484 U.S. 686 (1988); Smith v. Robinson, 468 U.S. 992 (1984). No such facts arise in this case.

CONCLUSIONS OF LAW

1. Respondent has failed to provide [redacted] with a free appropriate public education by failing to include short term instructional objectives in the IEP. No other breach of Respondent's obligation to provide [redacted] with a free appropriate public education has been established.[7]

2. Respondent has not violated the stay-put provision of 20 U.S.C. Section 1415(e)(3) of the Education for All Handicapped Children's Act.

3. This is the final decision on state level review. State Plan, Part B, Section VII.B.4.D.

Nancy Connick

NANCY CONNICK
Administrative Law Judge

DATED: At Denver, Colorado

March 14, 1990

FOOTNOTES

1/ The State Plan is prepared by the Colorado Department of Education, as required by the Act, to implement the provisions of the Act.

2/ State Plan, Part II, Section VII.B.4.

3/ Ultimate facts are conclusions of law or mixed questions of fact and law. These findings are usually stated in terms of the statutory standard at issue. Ricci v. Davis, 627 P.2d 1111, 1118 (Colo. 1981).

4/ Short term instructional objectives are measurable steps between a handicapped child's current levels of educational performance and the annual goals established by the IEP. They provide benchmarks for determining the progress made in reaching these goals. Department of Education Policy Interpretation, EHLR 103:56.

5/ [redacted] proposed placement following the November 30, 1989 IEP was not a temporary placement for evaluation purposes as permitted by 34 C.F.R. Section 300.342. Department of Education Policy Interpretation, EHLR 103:46.

6/ While this appears to be a major concern for Petitioners, the accurate representation of [redacted] opinion, as expressed by his wife, simply provides no basis for disputing the behavioral report.

7/ If Petitioners do not agree with the short term instructional objectives developed and wish to request a due process hearing in this regard, they will be limited solely to the issue of the propriety of such short term instructional objectives.

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado to: [redacted] [redacted], [redacted], [redacted], [redacted]; Kenneth DeLay and Margaret Sickel, Attorneys at Law, Miller & DeLay, P.C., 50 South Steele Street, Suite 1050, Denver, CO 80209-2815; Fred Smokoski, Colorado Department of Education, 201 E. Colfax, Room 305, Denver, CO 80203; on this 14th day of March, 1990.

Cathy Lopez
Secretary to Administrative Law Judge

ed9003.dec/cl

Case Number: 89:501

Status: Complaint Findings

Key Topics: Discrimination (§504 issue accepted as corollary to P.L. 94-142 issues)

Issues:

- Whether or not the district's policy about student seating during assemblies violated §504 of the Rehabilitation Act.

Decision:

- District's seating assembly plan did not violate §504.

Discussion:

- District assembly seating plan and policy.

FEDERAL COMPLAINT NUMBER [redacted]

FINDINGS AND RECOMMENDATIONS

Preliminary Matters

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education on February 22, 1989. The process for receipt, investigation and resolution of the complaint is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Section 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. On April 20, 1989, the complaints officer extended the date for resolution of the complaint from April 24, 1989 to May 19, 1989 for good cause.

2. The complaint was filed by [redacted] on behalf of her son [redacted]. The complaint is not a class complaint.

3. The complaint named as respondents the following parties: Dr. Kenneth S. Burnley, Superintendent, and Mr. Ron Hage, Director of Special Education, El Paso County School District No. 11 (hereinafter referred to collectively as "the district").

4. It is undisputed that [redacted] is a school age resident of the district. Further, [redacted] has been identified as being a handicapped student. The district is a recipient of federal funds for its educational programs and must comply with the provisions of the Rehabilitation Act of 1973, 20 U.S.C. 794 (Section 504).

5. The investigation of the complaint included a review of the student's individual education program, a review of the district's relevant documentation, discussions with each party, interviews with parents of other students in the district, and interviews with current district employees.

STATEMENT OF THE ISSUE

Whether or not the district segregated [redacted] in the school's auditorium balcony with all other S.L.I.C. and A.S.I.E.P. program students during Palmer High School Assemblies in violation of the requirements of Section 504.

RELEVANT STATUTORY AND REGULATORY CITATIONS:

29 U.S.C. 794, 34 C.F.R. 104.4, 34 C.F.R. 104.31 - 104.39.

FINDINGS

1. It is the policy of Palmer High School to hold assemblies in the auditorium between the third and fourth periods of the school day. Teachers are to accompany the students from their third period classes to the auditorium, where they take attendance.

2. The high school's faculty handbook contains a diagram depicting the required assembly seating arrangement.

3. The students in the following third period classes are assigned to seats on the first level: English, Foreign Languages, Home Economics, Math, Social Studies, Science, Business, Music, Vocational, and Health/Physical Education.

4. The students in the following third period classes are assigned to seats in the balcony: Student Improvement Center (study hall), Special Education (self contained) and Art. Additionally, all students who are not assigned to a classroom or study hall during third period are seated in the balcony (unassigned).

5. The seating plan was originally drafted so that students with classroom assignments on the 2nd and 3rd floors were assigned to the balcony and so there would be orderly movement to and from assemblies.

6. Contrary to complainant's allegations, several persons confirmed that handicapped students who are attending integrated classes during third period are seated with those classes for the assembly, They are not pulled out from their regularly assigned classrooms to sit with handicapped students from self contained classes in the balcony.

7. Approximately 30% of all identified handicapped students at Palmer are in integrated settings during third period and sit with their regularly assigned class regardless of where the special education assigned seats are located.

8. Individual special education teachers have seated their classes in other than the assigned area during assemblies and the administration has not disallowed the practice.

9. [redacted] is a non-assigned student during third period. Therefore, he is assigned to sit on the left side of the balcony with other unassigned students, the majority of whom are non-handicapped.

10. While this complaint is not a class complaint, in specific contrast to a companion complaint filed by complainant and designated by number 89:502, it is noted that students seated in the balcony do not participate to a lesser degree in the assembly nor receive a lesser benefit from the assembly than do the students seated in the lower level.

11. The district has not discriminated against [redacted] in violation of Section 504 in assigning him to a specific seat in the balcony with other non-assigned students who are both handicapped and non-handicapped.

RECOMMENDATION

While the district has not violated Section 504 in regard to [redacted] assignment during school assemblies, the district has stated that classroom assignments have changed somewhat since the assembly seating plan was conceived. Therefore, it is recommended that the district review the plan so that it can be assurred that the seating assignments continue not to discriminate against handicapped students and to reflect the need for orderly movement of the students into and out of the auditorium.

By: Cheryl M Karstaedt
Dated 15th day of May, 1989.
Cheryl M. Karstaedt
Federal Complaints Officer
Office of Federal Relations
Colorado Department of Education
201 E. Colfax Room 401
Denver, Colorado 80203
(303) 866-6759

Case Number: 89:502

Status: Complaint Findings

Key Topics: Free Appropriate Public Education (FAPE)
Shortened School Days
Transportation

Issue:

- Whether or not the district denies FAPE to handicapped students because it shortens their school days based upon the fact that they are handicapped and not on any individual needs basis.

Decision:

- The regular school day schedule is not shorter for handicapped students than it is for non-handicapped students unless dictated by an individual student's needs, thus, the class of handicapped studentsis not denied a FAPE on this basis.
- The district violated Section 504 in dismissing handicapped students earlier than non-handicapped students on early dismissal days for reasons of administrative convenience.

Discussion:

- Bus schedules.
- Class schedules of handicapped and non-handicapped students.

FEDERAL COMPLAINT NUMBER [redacted] 89:502
FINDINGS AND RECOMMENDATIONS

PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education on February 22, 1989. The process for receipt, investigation and resolution of the complaint is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Section 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. On April 20, 1989, the complaints officer extended the date for resolution of the complaint from April 24, 1989 to May 19, 1989 for good cause.

2. The complaint was filed by [redacted] on behalf of [redacted] [redacted], [redacted], [redacted], [redacted], [redacted] [redacted] and all similarly situated handicapped students in the S.L.I.C. and A.S.I.E.P. programs at Palmer High School.

3. The complaint named as respondents the following parties: Dr. Kenneth S. Burnley, Superintendent, and Mr. Ron Hage, Director of Special Education, El Paso County School District No. 11 (hereinafter referred to collectively as "the district").

4. The complaint alleges that the district discriminated against this class of students and denied them a free appropriate public education by offering them a regular school day of shorter duration than that offered to non-handicapped students. The complaint also alleges that these handicapped students were dismissed earlier than non-handicapped students on several early dismissal days.

5. It is undisputed that [redacted] is a school age resident of the district. [redacted] has been identified as a handicapped student. The district is a recipient of federal funds. It is responsible for providing special education and related services to students within its jurisdiction pursuant to the Education of the Handicapped Act as amended, 20 U.S.C. 1401 et seq. ("the Act"). As a recipient of federal funds, the district must comply with the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 ("Section 504").

6. The investigation of the complaint included a review of [redacted] individual education plan, review of the written information submitted by the parties, extensive telephone conversations with the parties and individuals, as requested by complainant, and conversations with several district staff members.

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STATEMENT OF THE ISSUE

Whether or not the district, as a matter of practice, provides shortened school days to those enrolled in certain special education programs at Palmer High School and whether or not such practice violates the provisions of the Act and its implementing regulations, or violates section 504 and its implementing regulations, by denying [redacted] and all similarly situated students a free appropriate public education offered in accordance with their individual needs.

RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(17), (18) and (19), 20 U.S.C. 1412(1) and (2)(B), 20 U.S.C. 1414, and 29 U.S.C. 794.

34 C.F.R. 300.4, 300.121, 300.130, 300.235, 300.300, 300.340, 300.346, and 34 C.F.R. 104.33.

State Plan Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142, Section II.

FINDINGS

1. The individual students named in the complaint attend Palmer High School, have been identified as handicapped students, and are placed in either the S.L.I.C. program or the A.S.I.E.P. program.

2. Of the students named as class representatives, the parents of two of them had no knowledge of the filing of the complaint and, had not shared the contents of their children's IEP's with the complainant, despite the allegations contained in the complaint.

3. At least one parent of one of the other students had no knowledge of the complaint before it was filed.

4. The information obtained during the investigation does not support the allegations of the complaint regarding the regular school day schedule.

5. There are approximately 35 students assigned to the S.L.I.C. program at Palmer High School and 4 students in the ASIEP program.

6. Only a total of six handicapped students leave the school on buses at 1:00 PM. Two of those students are being bused to job sites in accordance with the terms of their IEPs. Further, a number of the students in the class begin their programs at 7:00 AM rather than the 7:35, as alleged.

7. There was no evidence that the members of the staffing teams for this class of students were directed to or pressured to conform the students' programs to a school day schedule of 7:35 AM to 1:00 PM or 1:48 PM.

8. In fact, there was evidence to suggest that specific emphasis was placed by the district on considering the individual needs of each student when planning his or her educational program and schedule.

9. Of the several parents who were asked by complainant to provide information, neither could provide specific information on their children's schedules. Neither could they provide even general information on what needs their children might have that the district was not meeting within the timeframe of the children's daily schedules. Further, the parents had not attended the staffings for their children at which the students' programs and schedules had been established. Finally, the parents stated they had knowledge of their rights to challenge the districts' actions but chose not to exercise them.

10. One parent did state that her daughter did leave school at 1:00 PM until the complaint was filed and she now has a supervised job until 2:00 PM.

11. The district defines a full time student, handicapped or non-handicapped, as one who attends either five, six, or seven periods per day, except during one high school year when six periods are required.

12. Of the non-handicapped students at Palmer High School, approximately 18% attend for five periods per day (7:30 AM to 12:56 PM), approximately 31% attend for six periods per day (7:30 AM to 1:52 PM), and approximately 43% attend for seven periods per day (7:30 AM to 2:48 PM). The other 8% have a variety of schedules.

13. Of the handicapped students at Palmer High School, approximately 95% are enrolled for six or more periods per day. These students either take one of the six buses that leave the school at 3:00, walk or have other transportation from school as do the non-handicapped students at Palmer.

14. There is no minimum number of hours required by law that a handicapped student must be receiving educational services. The length of the school day is determined solely by the needs of the student as reflected on the child's individual education program.

15. [redacted] most recent IEP is dated November 21, 1988. It contains several addendum pages which appear to be dated January 17, 1989. Provision 10 on the addendum states that James is to

receive services for not less than six periods a day. Despite the dates on the document and on the addendum, the document does not appear to have been signed by complainant until March 2, 1989. Further changes were made and the document re-executed on March 20, 1989. [redacted] currently receives services of a six period per day duration in accord with the terms of his current IEP.

16. Palmer High School was on a special schedule for a minimal number of days during the 1988-89 school year including January 17, 18, and 19, 1989 and January 25, 1989.

17. The school schedule for those days was as follows:

17th - 8:00 AM - 3:00 PM - ALL STUDENTS EXCEPT SLIC
- 8:00 AM - 12:00 NOON - SLIC STUDENTS

18TH - 8:00 AM - 12:00 NOON - ALL STUDENTS

19TH - 8:00 AM - 12:00 NOON - ALL STUDENTS EXCEPT SLIC
8:00 AM - 10:00 AM - SLIC STUDENTS

25TH - 7:35 AM - 12:45 NOON - ALL STUDENTS EXCEPT THOSE ON SPECIAL EDUCATION BUSES

7:35 AM - 11:15 AM - SPECIAL EDUCATION BUS STUDENTS

18. The district offerred no educational justification for providing fewer services to the various groups of special education students on January 17, 19, and 25, 1989.

CONCLUSIONS

1. There is no evidence that the district discriminates against this class of handicapped children in violation of Section 504 in its scheduling of the students' regular school day programs.

2. There is no evidence that the district has systematically, through policy or practice, failed to offer this class of students a free appropriate public education in violation of the Act by not considering their individual needs when developing their individual education programs and regular daily school schedules.

3. There is no evidence that this class of students is offered educational programming from 7:30 AM to 1:00 or 1:48(sic) PM regardless of their individual needs in violation of Section 504 and the Act.

4. The district violated Section 504 by dismissing certain groups of handicapped students earlier than non-handicapped students

without an individually based justification for such action during three days in January 1989.

RECOMMENDED COMPLIANCE ACTION

It is recommended that on or before September 15, 1989 the district submit to the complaints officer a schedule of dates on which students at Palmer High School will be dismissed early during the 1989-90 school year. Further, the district will submit a written assurance that, unless an individual student's educational needs would justify a different arrangement, handicapped students will be dismissed at the same time as non-handicapped students on early dismissal days. Further, copies of any administrative memorandum, similar to those issued on January 13 and 23, 1988, which are issued during the 1989-90 school year will be forwarded to the complaints officer at the time of issuance.

Dated 18th day of May, 1989.

By: Cheryl M Karstaedt
Cheryl M. Karstaedt
Federal Complaints Officer
Office of Federal Relations
Colorado Department of Education
201 E. Colfax Room 401
Denver, Colorado 80203
(303) 866-6759

Case Number: 89:503

Status: Complaint Findings

Key Topics: Suspension/Expulsion
Behavior Management Plans

Issues:

- Whether the district's action of suspending student violated the EHA and/or §504.
- Whether the series of suspensions imposed on the student constituted a change in placement.

Decision:

- Neither the series of suspensions nor the actions under the suspension and treatment plan constituted a change in placement.

Discussion:

- Student's disciplinary history.
- Suspension for treatment plan was behavioral management tool incorporated into the IEP.
- Staffing meetings held to consider suspension.
- Series of suspensions.

FEDERAL COMPLAINT NUMBER [redacted] 89:003

FINDINGS AND RECOMMENDATIONS

PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education, on March 15, 1989. The process for receipt, investigation and resolution of the complaint is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Section 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. On May 11, 1989, the complaints officer extended the date for resolution of the complaint from May 15, 1989 to June 22, 1989 in order to consider and follow-up on additional documentation submitted by the parties.

2. The complaint was filed by [redacted] on behalf of her son, [redacted]. The complaint named as respondents Dr. Richard Koeppe, Superintendent and Ms. Cheryl Caldwell, Director of Special Services, Denver Public Schools ("the district").

3. The complaint alleged that the district suspended [redacted] in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 and of the Education of the Handicapped Act, 20 U.S.C. 1401 et seq. ("the Act"). Further, the complaint alleged a failure by the district to provide [redacted] with the services called for by his individual education plan from January 1988 to August 1988.

4. The complaint was accepted in part, as more fully set forth in the statement of the issue below. However, that part of the complaint dealing with [redacted] January 1988 - August 1988 IEP was not accepted for investigation. Additionally, in the acknowledgement and notification letter sent by the complaints officer on March 27, 1989, the alleged violation of Section 504 was not accepted for investigation. However, upon reconsideration, the facts as alleged regarding the suspension were reviewed in light of the requirements of the Act and Section 504.

5. It is undisputed that [redacted] is a school age resident of the district. He has been identified as a handicapped student in need of special education and related services. The district is a recipient of federal funds and must comply with the terms of Section 504. The district also receives funds specifically to provide special education and related services to students within its jurisdiction who are defined as handicapped under the Act.

6. The investigation of the complaint included a review of [redacted] IEP, a review of the documents in his education file from the 1988-89 school year relevant to the complaint, a review of additional written information submitted by the parties and several telephone conversations with each of the parties.

7. During several conversations with the complainant, it became apparent to the complaints officer that complainant has had and continues to have numerous areas of dispute with the district over [redacted] educational program. The complainant is aware of and knowledgeable about the procedural safeguards available to her pursuant to the Act and other relevant laws which would permit her to seek redress of her several grievances. The complaints officer is unaware of whether or not these disputes are being dealt with in some other forum. It is the understanding of the complaints officer, however, that the issue of the legality of [redacted] suspension is not being reviewed elsewhere. The substance of these findings and recommendations are necessarily limited to that issue, as set forth below.

STATEMENT OF THE ISSUE

Whether the district's action of suspending [redacted] on March 8, 1989 for a period of time violated the provisions of the Act and its implementing regulations and/or violated the provisions of Section 504 and its implementing regulations.

RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1415(b)(i)(C), 20 U.S.C. 1415(e)(3) and 29 U.S.C. 794.
34 C.F.R. 300.237, 300,504(a)(1), 300.505(2), 300.513 and 104.35.

FINDINGS

1. [redacted] began the 1988-1989 school year receiving special education and related services pursuant to an IEP developed as a result of a review staffing held on August 8, 1988. Complainant signed the IEP on August 23, 1988. [redacted] was placed in a program at East High School.

2. [redacted] was suspended from school from October 3, 1988 through October 7, 1988 pursuant to the terms of the district's Suspension and Expulsion Policy No. 1205 E and Conduct and Discipline Policy No. 1214 C. These policies were adopted pursuant to the district's authority under C.R.S. 22-33-105 (1988 Repl. Vol.) [redacted] was suspended for running from the school grounds and biting a community member.

3. On October 5, 1988 a staffing was held to assess the reason for [redacted] behavior and to plan for his reentry into school. Complainant states that [redacted] returned to school after 3 days, not after the 5 days for which he was originally suspended.

4. [redacted] was next suspended for the 3 days from October 26, 1988 through October 28, 1988 for biting a student and an aide. The suspension was implemented pursuant to district policies No. 1205E and No. 1214C.

5. The district professionals working with [redacted] met on October 27, 1988. A staffing meeting was held on October 28, 1988 and was attended by complainant and representatives of the school staff, the district's administrative staff, the Denver Board, the Denver Association For Retarded Citizens and the residential placement staff. A plan entitled "Suspension For Treatment" was proposed at this meeting. It was committed to writing to be implemented for [redacted] as an additional characteristic of service on his current IEP.

6. Essentially, the "Suspension For Treatment Plan" is a behavior intervention technique for dealing with students whose handicapping condition results in an assault on staff or students or results in the handicapped student being out of control and endangering himself or others. It allows for the student to be out of his classroom for a period of time from 1-3 days while a staffing is held to deal with the issue and the student's needs. The student can continue to receive services outside of the classroom setting. The provisions of district policies No. 1205E and No. 1214C do not apply to these situations. The use of the term "suspension" in the context of a behavior plan is somewhat misleading and the district may wish to consider changing the plan's name.

7. On October 28, 1988 an advocate from the Denver Association for Retarded Citizens sent a letter to the district on behalf of the complainant detailing a number of concerns which complainant had about her son's education program. No mention was made of the "Suspension For Treatment Plan".

8. The "Suspension For Treatment Plan" was implemented on November 17 and 18, 1988 when [redacted] assaulted a paraprofessional. An annual review meeting was held on November 18, 1988. At that time a new IEP was drawn up which specifically referred to the Suspension for Treatment Plan component that had been added in October to [redacted] current IEP. There is nothing to indicate that the use of the plan was questioned by complainant at this time. The new IEP was not signed by complainant until January 30, 1989.

9. On December 28, 1988, in a letter from complainant and her advocate to the district, complainant expressed her disagreement with the "Suspension For Treatment Plan" and questioned its benefit for her son.

10. The "Suspension For Treatment Plan" was implemented again from January 19 to January 20, 1989 when [redacted] assaulted a paraprofessional, ran from school, pounded car windows and harassed passersby.

11. As noted, the complainant signed a new IEP on January 30, 1989. A staffing was held on January 31, 1989, which the complainant attended, and several new steps were agreed to in order to assist [redacted] in controlling his behavior. The "Suspension and Treatment Plan" does not appear to have been changed at this time.

12. The third implementation of the "Suspension For Treatment Plan" occurred on February 20 and 21, 1989 when [redacted] left his job site, pounded on car windows, broke windows, and was transported to an emergency room.

13. On March 8, 1989 [redacted] was suspended for 5 days pursuant to the provisions of district policies No. 1205E and No. 1214C for an assault on his bus driver and a paraprofessional. Pursuant to the district policies, the principal of East High School requested a 10 day extension to the suspensions. Complainant requested that the district hold a hearing on the suspensions. A staffing was held on March 14, 1989 as was the hearing on the suspension. The hearing officer ordered that [redacted] be permitted to return to school the following day and [redacted] did so.

14. This federal complaint was received on March 15, 1989. Subsequent to that time, numerous changes have been made to [redacted] IEP, including a change of placement.

15. [redacted] was suspended in accordance with district wide policies on Conduct and Discipline and Suspension and Expulsion for a total of eleven days prior to the filing of this complaint.

16. [redacted] was "suspended" pursuant to the terms of the "Suspension and Treatment Plan" developed by a staffing team as a behavior intervention technique for a total of six days prior to the filing of this complaint. According to the complainant, during at least two of these days, [redacted] received services by the district at his residential placement.

17. [redacted] first two suspensions pursuant to district policy were only several weeks apart and prompted the staffing team to reconvene. The team developed the "Suspension For Treatment Plan" as a behavior intervention tool to assist [redacted]

18. The plan's implementation resulted in [redacted] being out of the classroom for two days at a time during 3 of the 4 succeeding months.

19. [redacted] third suspension pursuant to district policy precipitated a series of meetings that resulted in the change of [redacted] placement.

CONCLUSIONS

1. In determining whether or not a series of suspensions constitutes a change of placement the length of each suspension, the proximity of the suspensions to one another and the total amount of time the student has been excluded from school must all be considered.

2. The series of three suspension pursuants to district policy No. 1205E "Suspension and Expulsion" and policy No. 1214C "Conduct and Discipline" did not constitute a significant change of placement when considered by themselves or in conjunction with the three instances when the "Suspension and Treatment Plan" was implemented.

3. Since the activities did not constitute a change in placement, the procedural protections of the Act and Section 504 need not be implemented.

4. The district did not violate either the Act and its implementing regulations nor Section 504 and its implementing regulations.

Dated 5th day of June, 1989.

By: Cheryl M Karstaedt
Cheryl M. Karstaedt
Federal Complaints Officer
Office of Federal Relations
Colorado Department of Education
201 E. Colfax Room 401
Denver, Colorado 80203
(303) 866-6759

Case Number: 89:505

Status: Complaint Findings

Key Topics:
IEP
Notices
Least Restrictive Environment (LRE)
Personnel Qualifications
Funding
Free Appropriate Public Education (FAPE)
Class Size
Related Services

Issues

- Whether or not handicapped students in the district were denied FAPE because of a failure to appropriately develop IEPs for them, to provide appropriate notices to Spanish speaking parents and to offer services in the LRE.

- Whether or not handicapped students are denied FAPE because of student/staff ratios, unqualified staff and lack of staff.

- Whether or not handicapped students were denied FAPE because district failed to provide sufficient instructional materials and to properly account for expenditure of funds under EHA (Education of the Handicapped Act).

Decision:

- Spanish speaking students were not assessed appropriately.

- Action taken to notify Spanish speaking parents of procedural safeguards available were not well documented.

- Handicapped students do receive services in the LRE based on each individual's need.

- District staff are appropriately qualified.

- Student assignments were reasonable.

- Related services called for on individual IEPs were provided.

- District had adequate materials and properly accounted for funds.

Case Number: 89:505
Cont'd

Discussion:

- Results of investigative file review.
- Development of new comprehensive plan to address procedures.
- Efforts to keep Spanish speaking parents informed.
- Data on continuum of services available.
- Data on staff records, class assignments and personnel.
- Review of available materials
- Review of auditing records.

FEDERAL COMPLAINT NO. [redacted] 89.505
FINDINGS AND RECOMMENDATIONS

PRELIMINARY MATTERS

1. On April 10, 1989, the Executive Director of the Special Education Services Unit, Colorado Department of Education, (CDE) received a request from the United States Department of Education, Office of Special Education Programs (OSEP) to investigate several allegations made by [redacted] against Burlington School District RE-6J (the district). The allegations had come to the attention of OSEP through a letter from the Honorable Hank Brown, U.S. House of Representatives. OSEP also referred the complaint to the Regions VIII Office for Civil Rights of the U.S. Department of Education (OCR).

2. The process for receipt, investigation, and resolution of a complaint to CDE is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Sections 76. 780 et seq. and Colorado State Board of Education Policy No. 1280.0. The regulations and policy were established pursuant to the requirements of the General Education Provisions Act, 20 U.S.C. 1221e et seq.

3. The complaint was accepted for investigation on April 19, 1989. The complaints officer extended the time for resolution of the complaint until this date due to the summer schedules of the parties involved and the great amount of documentation that had to be reviewed.

4. The complaint was filed by [redacted], a former teacher in the district, on behalf of all students in the district who had been found to need special education and related services pursuant to the Education of the Handicapped Act, 20 U.S.C. 1401 et seq. (the Act). The complaint named as a respondent the Burlington School District RE-6J, Mr. Harvey Billington, Superintendent. The East Central Board of Cooperative Educational Services (the BOCES) is the administrative unit responsible for implementation of the Act in a number of school districts including Burlington.

5. It is undisputed that the district and the BOCES receive funds specifically to provide special education and related services to students within their jurisdictions who are defined as handicapped under the Act.

6. The complaint generally alleged that the Act was violated by the district because students' individual education plans (IEPs) were not developed or implemented correctly, that staff qualifications and assignments were wrong and funds were not spent legitimately, as more fully set forth below. For purposes of these findings, I have grouped the issues under the three topics of IEPs, staff, and funds. The district and BOCES denied the allegations contained in the complaint.

7. The investigation of the complaint included a review of the following documentation:
   a. Special Services Comprehensive Plan and Procedures Manual, April 1989.

   b. Special Education Comprehensive Plan, May 1981, as revised September 15, 1982 and September 15, 1985.

   c. East Central BOCES On-Site Reports, December 3,4, and 5, 1985; May 2,3, and 4, 1983.

   d. East Central BOCES Targeted On-Site Report June 9, 1988.

   e. On-Site Remediation Plan, March 1986.

   f. Sample of approximately 20% of the total number of student files for students placed in special education in the district.

   g. CDE Special Education BOCES Staff Lists 86-88.

   h. BOCES Applications for funding and financial records at CDE.

   i. BOCES independent audit records.

   j. BOCES staff assignment and student assignment records.

   k. Various documentation submitted by complainant including narrative notes, student information, and BOCES memoranda to staff.

   l. BOCES IMC documents.

The investigation also included interviews with the complainant and various staff members of the district, the BOCES and CDE.

I. IEP ISSUES

A. STATEMENT OF THE ISSUES

Whether or not the students in the district who have been identified as handicapped under the Act are being denied a free appropriate public education in violation of the Act because the district and BOCES have failed to appropriately develop IEPs for them, have failed to provide appropriate notices to Spanish speaking parents, and have failed to apply "least restrictive environment" principles when offering services to the students.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(18), 1401(19), 1412(1), 1412(2)(B), 1412(5)(B) and (C), 1414(a) and 1415(b)(1)(C) and (D).

34 C.F.R. 300.4, 300.121, 300.227, 300.235, 300.300, 300.340-349, 300.504(a), 300.505, 300.531-532, and 300.550-553.

Fiscal Year 1989-91, State Plan Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142, Sections II, V, VI and X. (State Plan)

C. ALLEGATION NO. 1

Complainant alleged that 15 of her 17 students during one given semester did not have IEPs developed. Further, [redacted] alleges that several student files contained blank IEP forms with parental signatures. Additionally, [redacted] asserts that Spanish speaking students are not adequately assessed using appropriate test instruments so that the IEPs developed for them do not correctly identify their needs. These allegations were denied by the district and BOCES.

D. FINDINGS

1. The review of the educational records of 20% of the students receiving special education or related services in the district did not substantiate the allegations that no IEPs were developed and that blank signed IEPs were in the files. It did substantiate the allegation that students whose primary language is Spanish were not assessed appropriately.

2. Each file reviewed contained a current IEP to be implemented for the student until the next annual review staffing. No files contained blank IEP forms signed by the parents.

3. The district and BOCES did violate the above-cited statutes and regulations, particularly 20 U.S.C. 1412(5)(c) and 34 C.F.R. 300.531-532, by failing to provide and administer tests to certain children in their native language.

4. The files reviewed by CDE staff included some of those specifically named by complainant in her discussions with the complaints officer. The district and the BOCES did not have prior notice as to which files would be reviewed.

5. The newly adopted Comprehensive Plan of the BOCES contains policies and procedures to insure that IEPs are appropriately developed. (Comprehensive Plan pp.60-75, Attachments) and the BOCES assures compliance with this plan in exchange for receipt of funds under the Act. The plan is currently undergoing review by a team of experts pursuant to the established plan approval process. Any deficiencies noted in the plan will be handled in accord with the process for obtaining plan approval.

E. ALLEGATION NO. 2

Complainant alleges that Spanish speaking parents of special education students do not receive appropriate notices in Spanish, do not receive copies of their procedural rights under the Act and do not have interpreters available for them at staffings.

F. FINDINGS

1. The district has available a written notice in Spanish informing parents of staffing meetings and their purpose which it sends prior to holding such meetings.

2. The district routinely distributes to parents copies of a brochure developed by CDE which informs parents in both English and Spanish of their rights and their children's rights under the Act.

3. The district employs a bilingual paraprofessional who states that she has attended the staffing meetings of all special education students whose primary language is Spanish or whose parents' primary language is Spanish in order to interpret the proceedings. She also states that she receives requests from the special education staff on a regular basis to translate letters to be sent to parents regarding their children's educational programs and that she does translate and send those letters.

4. The bilingual paraprofessional has also made presentations at various parent group meetings regarding parents' and students' rights under the Act. She has also had verbal contact in person and over the telephone with Spanish speaking parents of children receiving services under the Act.

5. The actions described in paragraphs 1 through 4 are not always well documented in the children's educational records. Notices of IEP meetings in Spanish were contained in some files but not others. The fact that the district paraprofessional attended some staff meetings and that the interpreter was available is found in IEP documents but there is no signature line to indicate this. There is good documentation of parent contacts including logs of phone calls made or attempted. However documentation of a number of the efforts made by the district to inform and explain to parents their rights was not available.

6. The newly adopted Comprehensive Plan of the BOCES contains policies and procedures to insure that Spanish speaking parents receive the appropriate notices and information in their primary language. (Comprehensive Plan pp.7-8) The BOCES assures compliance with this plan in exchange for receipt of funds under the Act.

G. ALLEGATION NO. 3

Complainant alleges that the amount of time which special education students are to spend in regular education pursuant to their IEPs is not carried out and that all students are served in self contained classrooms without access to regular education.

H. FINDINGS

1. The review of student files, staff assignments and class lists, and information obtained in interviews did not substantiate this allegation.

2. All IEPs stated an amount of time to be spent in special education. From the records reviewed no child spent 100% of the time in special education classes. The majority spent more than 60% in regular education classes. The amount of time varied per child based on an assessment of the child's individual needs.

3. Most students are served using a resource room model in the district although other types of service models are available in the BOCES if called for by a student's IEP.

4. The district does apply the principles of the least restrictive environment concept in determining handicapped students' placements for receipt of special education and related services.

II STAFF ISSUES

A. STATEMENT OF THE ISSUES

Whether or not the students in the district who have been identified as handicapped under the Act are being denied a free appropriate public education in violation of the act because the district and BOCES have assigned too many students to each staff person, have hired staff without appropriate qualifications, and have not hired sufficient staff to provide related services to students.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(17) and (18), 1412(1), 1412(2)(B), 1413(a)(14) and 1414(a)(1)(C) and (E).

34 C.F.R. 300.4, 300.121, 300.153, 300.223, and 300.300.

State Plan Section X

C. ALLEGATION NO. 4

Complainant alleged that the staff members hired by the BOCES and district to provide special education and related services to the handicapped students in the district were not appropriately certified. [redacted] also raises issues regarding appropriate levels of supervision of paraprofessionals in a classroom or other school setting. This latter issue is one over which the local districts and BOCES have discretion under state law.

D. FINDINGS

1. The BOCES and district are required to submit information to CDE regarding the teacher certification status of its staff for reimbursement purposes under state law and in order for CDE to confirm the staff members' qualifications to be teaching special education students.

2. A review of CDE, BOCES and district records demonstrates that all teachers employed to provide special education to handicapped students currently have the appropriate credentials and had such credentials during the time questioned by complainant.

E. ALLEGATION NO. 5

Complainant alleged that too many special education students were assigned to the special education staff persons.

F. FINDINGS

1. A review of BOCES and district class records and staffing records and the information provided by BOCES and district personnel do not substantiate this allegation.

2. CDE does not have specific standards as to how many students may be served by any one staff person over the course of a year although certain regulations do exist for reimbursement provisions in the state funded program. Local districts have complete discretion over the assignments of paraprofessionals to assist the teaching staff.

3. Student assignments to staff in the district were reasonable when taking into consideration state law and the amount of special education and related services provided to students in accordance with the terms of their IEPs by any one particular staff person during the school year.

4. The BOCES has adopted a Comprehensive Plan which assures, in part, that staff members are appropriately assigned to meet the student's needs.

G. ALLEGATION NO. 6

Complainant alleges that the district and BOCES failed to employ sufficient staff to provide related services to students.

H. FINDINGS

1. There was not a great deal of information available to readily assess whether or not the related services called for by the IEPs of all of the students prior to the 1988-1989 school year were sufficiently met by the staff of the District or BOCES. Therefore documentation was also reviewed for the past 1988-1989 school year.

2. The Follow-Up Report of the 1985-1986 On-Site Evaluation of the BOCES noted at page 20 that the BOCES had available a well designed system based on an interagency approach for providing related services to handicapped children. It went on to detail the arrangements in place to provide the following types of services: psychological, social work, occupational/physical therapy, health, audiology and transportation.

3. Currently the district has available staff members to provide the following related services as called for on a student's IEP or has contracted to make the services available: occupational therapy, psychological, speech, nursing, social work, audiology and physical therapy. Records were reviewed as to how often a specified related service was provided to each student during the last school year.

4. No information was found that a child's IEP called for a specific related service that was not being provided by the district.

5. This allegation by the complainant was not substantiated.

III. FUNDS ISSUES

A. STATEMENT OF THE ISSUES

Whether or not the students in the district who have been identified as handicapped under the Act are being denied a free appropriate public education in violation of the Act because the district and BOCES have failed to provide appropriate instructional materials and have not properly accounted for their expenditure of funds under the Act.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(18), 1411, 1412(1), 1412(2)(B), and 1414(a)(1) and (b).

34 C.F.R. 300.3, 300.4 and Parts 76 and 77.

C. ALLEGATION NO. 7

> Complainant alleges she did not receive any funds for instructional materials after she was transferred to the middle school and that she had no access to the BOCES materials.

D. FINDINGS

1. The complainant's allegation is not substantiated by the evidence.
2. The funds which complainant did not receive in September 1987 prior to her departure from the district shortly thereafter were monies given to all teachers on a per teacher basis and the delay in their distribution was related to a new school principal being hired. It appears the money was distributed at a later date.
3. The materials available at the BOCES' Instructional Materials Center are extensive and the special education materials particularly so. Further, the BOCES distribution and circulation policies were reviewed as were the records of distribution during the 1988-1989 school year. The amount of materials distributed to Burlington was at least proportional to those distributed to other districts in the BOCES. Note was made of specific distribution of materials to the special educators in Burlington.
4. The BOCES IMC contained several boxes of instructional materials which had recently arrived as a result of an order generated after a staffing team had requested the materials for a particular handicapped student.
5. The BOCES IMC coordinator provides inservices to district staff and circulates a newsletter and materials catalogue to district personnel to inform them of what instructional materials are available.

6. The BOCES has received additional funds from the State, which the BOCES matched, to purchase additional instructional materials for use in providing special education and related services.

7. The BOCES and district also make extensive use of CDE's lending resources.

8. The newly adopted Comprehensive Plan at page 65 and 70 assures that the BOCES will continue to provide sufficient instructional materials for handicapped students.

E. ALLEGATION NO. 8

Complainant alleges that the district and BOCES did not appropriately expend funds under the Act.

F. FINDINGS

1. This allegation by complainant is not supported by the evidence.

2. The BOCES applications for funding under the Act over the years in question, which include the district, indicate the plan to use the funds primarily for salaries. The BOCES and district financial reports indicate that this was done.

3. The year end report for the year of concern to complainant (1987) entitled "Accountants' Report on Compliance With Laws and Regulations Related to Major and Non Major Federal Financial Assistance Programs" indicates that the program was administered in compliance with the laws and regulations pertaining to financial reports and claims.

4. Neither the above cited report nor any subsequent independent auditor's report brought to the state's attention, as required, any alleged mismanagement or misapplication of funds under the Act.

IV. COMPLIANCE ACTIONS

A. The district and BOCES will hold an inservice session on the issues of multi-cultural assessment and placement of students who may be referred for possible special education services. CDE will provide technical assistance at the meeting.

B. The IEPs of all students receiving special education in the district will be reviewed. CDE will provide funding for two independent persons to perform the actual review. The purpose of the review will be to determine if each student was appropriately assessed, with particular attention being paid to whether or not students were assessed using instruments appropriate to their multi-cultural status. The review will also focus on the documentation available to determine if, when, and how parents were notified of the procedural safeguards available to them under the Act.

C. Based upon the results of the complete IEP review, a report will be issued by the undersigned on or before September 29, 1989. Any additional areas of noncompliance noted at that time must be addressed by the district and BOCES in a plan to be submitted on or before November 15, 1989.

D. The afore-mentioned plan must provide that all identified areas of non-compliance be corrected by June 1, 1990.

E. Based upon the IEP reviews which took place as part of this complaint investigation, the BOCES will address in the plan how it will guarantee that students will be appropriately assessed including a list of instruments to be used for students whose native language is Spanish. Further, the district will address how it will document that parents are adequately informed of their rights in their native languages.

F. Staff members of CDE will monitor compliance with the plan.

Dated this 23rd day of AUGUST 1989,

Cheryl M Karstaedt
Cheryl M. Karstaedt
Federal Complaints Officer

CMK/klk

Case Number: 89:512

Status: Complaint Findings

Key Topics: Continuum of Services
Related Services
Least Restrictive Environment (LRE)
Free Appropriate Public Education (FAPE)

Issues:

- Whether or not the district failed to provide a FAPE to handicapped students in violation of the EHA by not insuring that a continuum of services/placements is available and by not providing services to the students in the LRE.

Decision:

- District did not fail to provide FAPE to class of handicapped students.
- District did not fail to serve students in LRE.
- District did not fail to offer a continuum of services/placements.
- It was recommended that staffing teams discuss and document availability of specific related services for each student and document discussions on the continuum of services/placements available for each student.

Discussion:

- Characteristics of student placements.
- District asserted that if a student requires a particular placement it would be offered.
- Hypothetical argument that district would not serve needs of students who might need separate classrooms or day treatment is not enough to find violation of law.
- IEP teams recommended related services for the several students who needed them but it was unusual for so few students to be found in need of related services.

FEDERAL COMPLAINT NUMBER [redacted] 89:512

FINDINGS AND RECOMMENDATIONS

Preliminary Matters

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education (CDE), on November 22, 1989. The process for receipt, investigation and resolution of a complaint to CDE is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. Section 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. The regulations and policy were established pursuant to the requirements of the General Education Provisions Act, 20 U.S.C. 1221e et seq. On January 16, 1990, the complaints officer, with the concurrence of the parties, extended until February 5, 1990 the date for resolution of the complaint.

2. The complaint was filed by The Legal Center Serving Persons With Disabilities, in its capacity as the Protection and Advocacy System for Persons with Developmental Disabilities for the State of Colorado. It was brought on behalf of all junior high and high school aged students identified as having significant identifiable emotional/behavioral disorders (SIEBD) and entitled to special education and related services from the respondents pursuant to the Education of the Handicapped Act, as amended, 20 U.S.C. 1401 et seq. (the Act), (the students).

3. By amendment on December 4, 1989, the complaint named as respondents the following parties: Mr. Don LaCrue, Director of Special Education and Dr. Donald White, Superintendent, East Otero School District R-1, (the district) and Mr. Mike Ainsworth, Executive Director, Arkansas Valley Board of Cooperative Educational Services, (the BOCES).

4. It is undisputed that the district and the BOCES receive funds specifically to provide special education and related services to students within their jurisdictions who are defined as handicapped under the Act.

5. The complaint generally alleged that the district and the BOCES violated the Act by failing to insure that a continuum of services or placements is available to meet the needs of the students for special education and related services. Specifically, it was alleged that no special classes were offered. Further, it was alleged that the Act's requirements regarding placement in the least restrictive environment were violated. The district and BOCES denied the allegations contained in the complaint.

6. The respondents requested that the complaint be dismissed without an investigation because it lacked specificity and contained insufficient facts to support the allegations. However, the Complaints Officer found the complaint sufficient for purposes of initiating an investigation.

7. The respondents requested that the complaint be dismissed as untimely. However,

violations of law were alleged to be ongoing as of the date of the filing of the complaint. Therefore, the Complaints Officer found the complaint to be timely for purposes of initiating an investigation.

8. The investigation of the complaint included a review of CDE and BOCES documentation on the placements of junior high and senior high school aged SIEBD students, BOCES Evaluation and Individual Education Program forms, documentation submitted by complainant regarding one student and of the BOCES Special Services Comprehensive Plan and Procedures Manual. It also included discussions with the parties' representatives' and several CDE consultants who had information about the respondents' programs for this particular class of students.

STATEMENT OF THE ISSUES

Whether or not the district and BOCES are failing to provide a free appropriate public education to the students in violation of the Act by not insuring that a continuum of services/placements is available to meet the needs of the students for special education and related services, and by not providing services to the students in the least restrictive environment.

RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (17), (18) and (19), 1412 (2)(B) and (5)(B), and 1414(a)(1)(C)(iv).

34 C.F.R. 300.4, 300.13, 300.14 and 300.550-556.

Fiscal Year 1989-91 State Plan Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142 Sections II and X.

Findings

1. There are seventeen members of the student class on whose behalf the complaint was filed.

2. Sixteen members of the class receive services by either a resource room or consultive delivery model. One student's placement is listed as "self-contained" although he is placed with regular education students for physical education and woodshop. His placement is currently a matter of dispute and the location of his "self-contained" classroom was the room used at varying times throughout the day as the resource room by approximately five students. The various staffing teams which met on behalf of these students did not recommend placement in a self-contained classroom for any other member of the class. Neither were any members of the class placed in more restrictive environments such as the Boys Ranch, as alleged in the complaint.

3. It is the district's position that the arrangement provided for the student whose IEP called for a "self-contained" classroom complied with the requirements of the student's IEP regardless of what the delivery model was called. Complainant asserts this is not the case.

That dispute is not the issue here. Rather, the issue is whether or not the district has available a continuum of services to meet the needs of the student class. Since the staffing teams determined that, with one exception, the needs of the students would be met by resource room or consultive delivery models, the district has made those delivery systems available. The district feels that it placed the remaining student in a program as called for on his IEP.

4. There are no students within the class whose IEPs call for their needs to be met in a separate classroom or day treatment setting with no integration with regular or other special education students during the day. Therefore, to find that the district would not appropriately serve these hypothetical students is unwarranted.

5. If the staffing committee which determined the one student was to be served in a self-contained classroom intended that he be served in a setting that did not include participation by students in resource room activities, then the student's IEP should so state. If the student is to receive instruction to meet his individual needs in a self-contained classroom to include students with similar needs, the district is not obligated to provide such a class if no other students exist but would focus on creating a model to meet the unique needs of the individual student.

6. Further, there is simply no factual basis upon which to conclude that the affective needs of the students are not being met in the placements recommended by the staffing teams, which are for the most part regular education plus resource room services or regular

education plus consultive services by special education personnel.

7. There is no factual basis for a finding that there is a group of students whose affective needs can only be met in self-contained or day treatment programs which are not currently available from the district and BOCES.

8. According to district information, the staffing teams recommended related services for only 2 of the students. These services included vocational services, an evaluation, and counseling with the BOCES psychologist.

9. The district states that, if a staffing team found that a student needed them, the following related services could be provided to a student: counseling, speech therapy, occupational therapy, physical therapy, recreation, transportation, drug and alcohol counseling, parent counseling, and vocational training or other services identified by the staffing team. The services would be provided by the district or BOCES staff or through contract with another person or entity.

10. It is unusual for the members of a class this size, given the characteristics of the class members, for so few students to be in need of related services. However, the state is not in a position to override a staffing team decision in the complaint process.

11. The BOCES' Special Services Comprehensive Plan and Procedures Manual, February 1989, contains assurances regarding the availability of a continuum of services, and provision

of services in the least restrictive environment. It specifically recognizes there may be a need for curriculum or instruction in a variety of alternative environments which is not offered as part of regular education, including affective education.

12. On several occasions during the past year, CDE consultants have provided technical assistance to district and BOCES staff on issues related to meeting the needs of these students. Additionally, district and BOCES staff members have attended workshops and training sessions on topics related to meeting the needs of these students.

CONCLUSIONS

13. The district and BOCES did not violate the Act, its implementing regulations, or the state plan by failing to provide a free appropriate public education to the students on the basis of the allegations contained in the complaint.

14. The district and BOCES did not fail to serve the students, as a class, in the least restrictive environment.

15. The district and BOCES did not fail to provide a continuum of services/placements to meet the needs of the students for special education and related services as defined by the staffing teams on the students' IEPs.

RECOMMENDATIONS

16. In order to assure that a continuum of placements and related services is available to

the students in the least restrictive environment, the Complaints Officer recommends and the district and BOCES agree to undertake the following actions:

a) develop a form to be distributed to all members of the staffing teams for each of the students in the class that clearly states that the district and BOCES will provide related services as are required to assist a handicapped child to benefit from special education.

b) state in the form that related services may include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, medical services for diagnostic or evaluation purposes, school health services, social work services in schools, and parent counseling and training.

c) assure that the staffing teams discuss the contents of the related services form at the next annual staffing review for each of the students in the class and note such discussion on the IEP documents in the area designated "related services."

ok

d) develop a form, or include it with the related services form, to be distributed to all members of the staffing teams for each of the students in the class that clearly states that each student's placement is to be based on his or her individualized educational program and needs and not based on a category of handicapping condition, the configuration of the service delivery system, or the availability of a related service.

ok

e) state in the placement form that the district offers a continuum of alternative placements to meet the needs of the students for special education and related services, including instruction in regular classes, special classes, special schools, home instruction, instruction in hospitals and institutions, resource room services and itinerant instruction.

f) assure that the staffing teams discuss the contents of the placement form at the next annual review staffing for the students in the class and note such discussion on the IEP documents in the area designated "placement."

17. It is further recommended that each student in the class have a review staffing prior to the commencement of the 1990-1991 school year.

18. Finally it is recommended and the district and BOCES agree that the complaints officer be sent a copy of the form developed on or before March 1, 1990 and copies of page 5 of each student's Comprehensive Evaluation and Eligibility Report. The copies of the Comprehensive Evaluation and Eligibility reports will be forwarded on June 1, 1990 for those students whose staffing are held prior to that time and on or before September 1, 1990 for the remaining students

Dated this 5th day of February 1990.

Cheryl M. Karstaedt
Federal Complaints Officer

Case Number: L90:100

Status: Impartial Hearing Officer Decision

Key Topics: Change of Placement
Aide Services
Compensatory Education
Attorney Fees

Issues:

- Whether removal of an aide from the child's classroom constituted a change of placement without affording parents procedural safeguards and/or violated the student's IEP.
- Authority of hearing officer to award attorney fees.

Decision:

- Removal of aide violated child's IEP.
- Removal of aide was not a change in placement.
- Compensatory services to be offered during extended school year.
- Hearing officer has no authority to award attorney fees

Discussion:

- Process of current IEP development.
- Specific provisions in IEP and behavior management program.
- IEP did not have a specific provision for an aide or speech/language consultant.
- Needs of student for constant attention one-on-one or in small group settings.
- Child regressed in behavior management and speech/language program suffered after aide was removed.
- Changes to program not significant enough to be a change in placement.

APR 30

In the Matter of:

[redacted],

By and through her parents,

[redacted],

Petitioner,

v.

COLORADO SPRINGS SCHOOL DISTRICT 11,

Respondent.

FINDINGS AND DECISION
of
Impartial Hearing Officer
Joseph M. Goldhammer

Case #: L90:100

I.

INTRODUCTORY STATEMENT

THE HEARING was held on April 4, 1990, at the school administration building in Colorado Springs, Colorado. Jurisdiction is conferred by 20 U.S.C. § 1450, 34 C.F.R., § 300, et seq., and Part VII of the current Colorado Department of Education State Plan. The Petitioner was represented by Rita S. Ague, 2603 Flintridge Drive, Colorado Springs, Colorado 80918. The Respondents were represented by Nancy Westmoreland and Mike Gianunzio of Anderson, Johnson and Gianunzio, 104 South Cascade Ave., Suite 204, Colorado Springs, Colorado 80903.

The hearing was held pursuant to a request by a Petitioner filed by January 26, 1990. The issues stated in the request for hearing were (a) that the District's recent removal of an aide from [redacted] class constitutes a change of placement, (b) that this change of placement violated [redacted] IEP, and (c) there was no staffing to allow for this change of placement.

At the outset of the hearing, the District contended that the issues were moot because an aide who had been displaced from [redacted] program had been replaced in the classroom as of March 17, 1990. The hearing officer ruled that the case was not moot and proceeded to accept evidence on the issues as stated in the request for hearing.

After briefs were filed by the parties, the District filed a motion to strike a certain portion of Petitioner's Supplemental Brief as not relevant to the issues. The hearing officer considered that brief only insofar as it was relevant to the issues in Part II below.

Section VII.B.2.g.(1) of the current State Plan provide that a decision must be rendered and mailed within 45 days after the receipt of the request for hearing. Section VII.B.2.f. provides that the parties may agree that the time to reach a decision and mail findings may be extended up to an additional 45 days. The parties agreed upon this additional 45 days' extension.

II.

ISSUES

The issues as fairly construed in the Notice of Hearing are: (a) whether the removal of an aide from [redacted] classroom constituted a change of placement, and (b) whether the removal of that aide violated [redacted] IEP.

III.

FINDINGS OF FACT

The hearing officer makes the following findings of fact based upon the evidence adduced at the hearing:

1. [redacted] is an 11-year old multiply handicapped autistic child enrolled in the ASIEP (Autistic Screening Instrument for Educational Planning) program at Buena Vista Elementary School in Colorado Springs, Colorado. At the time of the execution of her individual educational program in October of 1989, she had attended the ASIEP program for approximately six years.

2. Marcia Braden is the coordinator of the ASIEP program in the Colorado Springs public schools and is engaged by the District as a consultant to operate the ASIEP program within the School District to service autistic students within the District. This engagement is memorialized by a Memorandum of Understanding entered as [redacted] Exhibit 14.

3. Marcia Braden was the principal representative of the School District in formulating [redacted] IEP dated October 24, 1989, and that IEP is in her handwriting.

4. Among the characteristics of service which the District

undertook to provide [redacted] on page four of her IEP are the following:

A. Placement in the ASIEP program.

B. Speech and language to be provided directly in the program.

C. Behavior management including restraining for running.

D. Extended school year or a program during the summer designed to prevent regression in [redacted] education.

5. Until the fall semester 1989, [redacted] benefitted from the services of a speech and language therapist. That therapist would design a program to improve [redacted] language abilities. This program would be implemented to a great extent by the aide assigned to [redacted] classroom.

6. [redacted] has severe language deficiencies and as one of her educational needs on page two of her IEP, she is to continue to have language as a primary focus in her education.

7. In approximately August of 1989 before the fall semester started, [redacted] developed the behavior of running away unless she is restrained or under extremely close supervision. When she runs away, she exits the building in which she is located, and runs across streets without regard for her physical safety. She can run for blocks before she is relocated.

8. As a result of her running behavior, her parents authorized the School District physically to restrain [redacted] in the classroom by means of a lap belt. Additionally, in September of 1989, Marcia Braden executed a document which she testified was a behavioral management policy which stated that [redacted] was to be kept on a "tot-link" while in transit with an adult present and was to be kept in a lap belt any other time period with one-to-one supervision. Furthermore, at that time, the document stated that her behavior would not be charted due to the severity of the behavior.

9. Approximately one month later, [redacted] current IEP was executed. That document referred to the behavior management policy as the standard for student conduct in [redacted] case. However, that behavior recognized that a number of the characteristics of service to be provided to [redacted] could be provided in a small group rather than an individual setting. Additionally, the IEP provided that the adults supervising [redacted]

were to "fade" or gradually phase out restraining in one-to-one training sessions. (See IEP, pp. 2 and 3.)

10. Judy Van Valen was [redacted] teacher from November 16, 1989, to the date of the hearing and continuing. From November 16, 1989, through January 9, 1990, Van Valen had three students in her class including [redacted]. On January 9, 1990, a fourth student was added to the class. Two of the four students in the class are self abusive and one of those is also abusive to others.

11. Due to budgetary considerations, Ron Hage, the Director of Special Education for the Colorado Springs Public Schools, under direction from the School District 11 School Board, laid off the aide in [redacted] classroom. The decision to cut the aide was motivated by budget constraints. Recommendations for where to cut were based upon where the richest ratios of student to staff were within the District. Mr. Hage in making these recommendations in good faith attempted to make cuts where they would be the least harmful. Mr. Hage testified that aides provide related services such as data collection, implementation of rewards for good behavior, and the general implementation of programs designed by professionals.

12. In considering where to recommend cuts, Mr. Hague did not look at individual IEP's of students. He informed Marcia

Braden of the proposed cut in the ASIEP program and recalls her generally negative reaction, but does not recall any specific discussion regarding [redacted] before the cut. However, after the cut, Hage recalls that he discussed the difficulties in cutting an aide from the program in which [redacted] was enrolled with Marcia Braden. Her position at that time was that the program was not as effective without the aide, and that [redacted] IEP required an aide in the program. Those discussions caused Hage to put an aide back in [redacted] classroom effective March 14, 1990, after he learned that a source of Federal funds was available to pay the new aide.

13. [redacted] IEP does not have a specific requirement for an aide or for a speech and language consultant. However, speech and language education must be provided directly as a related service under the IEP.

14. The aide was laid off on January 29, 1990. Prior to that time, the aide provided one-on-one instruction for [redacted], monitored her running behavior, held [redacted] on a tot-link or tether which is tied both to the aide and [redacted] when [redacted] was being moved. The aide also provided speech and language training and academic training for [redacted].

15. [redacted] is a severely handicapped student who needs either one-on-one supervision or small group supervision at all times.

16. In the fall semester of 1989, Marcia Braden was unsuccessful in her attempts to hire a speech and language therapist to assist with [redacted] educational program, and none was provided. Therefore, [redacted] teacher and aide continued to provide therapy as designed by the previous speech and language therapist. No new therapy was designed for [redacted]. Therefore, when the aide who, in part, implemented the program, was removed in late January 1990, [redacted] suffered a severe curtailment in her speech and language education for the period that the aide was absent.

17. As the person who composed the IEP, Braden testified that it was her intent to incorporate the behavior management program written September 20, 1989, into the IEP.

18. According to the footnote on page 2 of the District's Motion to Strike, the District placed a certified speech/language therapist in [redacted] program on or about April 4, 1990. Thus, at the present time, [redacted] benefits by the presence of both a therapist and an aide to implement the therapist's programs.

19. Judy Van Valen testified at the hearing that [redacted] needs constant attention in a one-on-one or small group setting

to keep her on task. Furthermore, she needs one-on-one attention in community outings because she must be attached to an adult by means of a tot-link. She testified that one-on-one supervision decreased after January 26, 1990, for [redacted] from approximately two to two-and one-half hours ~~(2-1/2)~~ per day to one and one-half hours per day. Van Valen further testified that [redacted] has run from the classroom and has gone to a 7-11 store approximately one mile from the school where she attempts to steal candy. She does not comprehend danger and given any opportunity, she will run.

20. Van Valen further testified that since removal of the aide in late January 1990, when [redacted] receives one-on-one attention, that attention isn't complete because Ms. Van Valen must monitor crises and tantrums which occur from time-to-time as the result of the behaviors of the other students in the classroom. Van Valen testified that as a result of the removal of the aide, [redacted] was only maintained at her educational level and that her running has become worse. Van Valen attributes [redacted] running behaviors partially to her frustration over not being able to express herself through language. Furthermore, the increase in her running behavior which occurred in the absence of the aide was caused by the lack of attention. According to Van Valen, [redacted] does not run when she is being supervised in a one-on-one situation.

21. Marcia Braden testified that as the result of the removal of the aide, [redacted] teacher was unable to fade restraining during one-on-one sessions as provided in her educational needs on page two of her IEP.

22. Van Valen testified that while [redacted] continued to make progress in skills that could be taught in a small group, the types of skills where one-on-one attention was required were adversely affected by removal of the aide.

23. The training of an aide is on-the-job training. Aides have no specialized educational qualifications. Therefore, the substitution of a new aide, effective March 14, 1990, for the aide that had previously served [redacted], did not constitute a violation of her IEP nor a change in her educational placement.

24. The removal of the aide on January 28, 1990, did not constitute a change in [redacted] educational placement. [redacted] was in the ASIEP program before and after the removal of the aide.

25. Insofar as the removal of the aide caused [redacted] to suffer a severe impairment of her speech language program which was to be a primary focus of her education and insofar as the removal of the aide caused her to regress in the behavior management aspects of her characteristics of service, the removal of the aide constituted a violation of [redacted] IEP.

IV.

DISCUSSION AND CONCLUSIONS

A.

The first issue before the hearing officer is whether the removal of the aide which took place at the beginning of the second semester of the 1989-90 academic year constitutes a change in placement under the Education for the Handicapped Act and in particular 20 U.S.C. § 1415(b)(1)(C). Counsel for the District cites several cases including Concerned Parents v. New York City Board of Education, 629 F.2d 751, ALR Fed. 559 (2nd Cir. 1980); Lunceford v. District of Columbia Board of Education, 745 F.2d 1577 (D.C. Cir., 1984); DeLeon v. Susquehanna School District, 747 F.2d 149 (3rd Cir. 1984); and Dima v. Mauchiarola, 513 F. Supp. 565 (1981). Petitioner contends that these legal authorities are not applicable, since they for the most part are cases in which the lack of finances in a district caused the closure of entire facilities and relocation of large numbers of children. Petitioner argues that the State Plan's definition of placement is more expansive and supersedes these cases in any event. The State Plan, p. 49, defines a placement as the "environment" in which a handicapped person receives the special education and related services which fulfill the objectives of the IEP.

However, the term "environment" as utilized in the State Plan is no more precise in meaning than the term "change of

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placement" as utilized in the EHA. Therefore, we can look to the cases cited by the District for some guidance regarding meaning of the term "change of placement".

The determination of that meaning, while enlightening, is not critical for the determination of this case. The Concerned Parents, Lunceford, DeLeon and Dima cases all examine the question of what constitutes a change of placement in the context of a Federal Court injunctive proceeding in which the plaintiff was seeking to enforce the "stay put" provision of the EHA, 20 U.S.C. § 1415(e)(3). If a handicapped child can prove a "change in educational placement" he must be kept in his then current educational placement until all proceedings under the EHA have been completed. In the present case, however, while the petitioners seek four specific remedies, they do not seek the invocation of the "stay-put" provision.

While a change in placement also triggers the requirements of prior written notice and a hearing, the petitioner here received notice of the removal of the aide at or about the beginning of the second semester and did request a hearing prior to the beginning of the semester. Thus, that procedural protection which accompanies a change in placement has been fulfilled in this case in any event.

While not fundamental to the decision in this case, the hearing officer is disinclined to find that the removal of the aide at the beginning of the second semester constituted a change in educational placement as defined by the EHA. *Concerned Parents* as followed in *Lunceford* both hold that a change in educational placement occurs only when there is a change in the "[g]eneral education program in which a child...is enrolled rather than mere variations in the program itself." *Lunceford*, *supra*, 745 F.2d at 1582 citing *Concerned Parents*, 629 F.2d at 754. The removal of the aide constituted a variation in [redacted] program rather than changes in her general educational placement. She was enrolled in the ASIEP program both the first and second semesters of the 1989-90 academic year.

Even under the more expansive reading adopted in *DeLeon*, [redacted] educational placement was not changed at the outset of the second semester. That case holds that a change in placement occurs when "the decision is likely to affect in some significant way the child's learning experience." This is an extremely subjective test. However, judging by the fact that [redacted] one-on-one time decreased approximately 1 hour per day from 2-1/2 to 1-1/2 hours, and that she continued to improve her skills in some areas where one-on-one supervision is not required, it is this hearing officer's subjective view that those changes are simply not significant enough to require the school district to maintain the status quo during the pendency of these proceedings.

However, that determination is mainly academic, because as both Lunceford and Concerned Parents make clear, the inquiry must continue even after the determination that a change in educational placement has not occurred, because the parents of a handicapped child can obtain an impartial due process hearing under 20 U.S.C. § 1415(b)(1)(E) by contending at any time that their child is not receiving a free appropriate public education. As Lunceford states,

> "Thus a parent or guardian always has an opportunity to present complaints relating to a child's educational placement, even if the situation complained of does not amount to a change in educational placement."

Lunceford, supra, at 1578 fn. 1. The parent is always free to contend that his child is not receiving a free appropriate public education as the result of violations of his individualized educational program, since, by definition, a free appropriate education must be provided in conformity with the IEP. 20 U.S.C. § 1401(18)(D). That is precisely what Petitioner contends here, and that is the essence of Petitioner's case in any event.

Thus, although the hearing officer determines that [redacted] educational placement did not change during the second semester, we must proceed to determine whether her IEP was violated in spite of the lack of any change in educational placement.

B.

The hearing officer will proceed to determine whether [redacted] IEP was violated. That determination is not barred by lack of notice to the school district. The Request for Hearing specifies that one of the issues in this case is whether the alleged change in placement violated the IEP. Although the hearing officer determined that no "changes in placement" occurred, the parties agree that a change in [redacted] program did occur. That is the change referred to in the request for hearing in numbered paragraph 2.

Likewise, determination of that issue is not barred by the fact that some of the variances in [redacted] program were motivated by budgetary reasons. Since no change in placement occurred, Tilton v. Jefferson County Board of Education, 705 F.2d 800 (6th Cir. 1983) cited by the District is inapplicable. That case holds that if a school district must discontinue a program or close a facility for purely budgetary reasons, the stay put provisions of the act, 20 U.S.C. § 1415(e)(3) do not require maintenance of the same educational placement. Here, no program was discontinued, no facility was closed, and Petitioner does not seek invocation of the stay put provisions.[1]

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[1] It is an unwarranted expansion of Tilton to construe it to hold that a District may violate an IEP if it has budgetary reasons for doing so. If a District cannot comply with an IEP for financial reasons, it can always hold a staffing and modify the IEP, so long as the modified IEP provides a Free Appropriate Public Education.

The Petitioner can point to no specific provision of the IEP requiring an aide to support his claim that removal of the aide violated the IEP. Furthermore, the final two pages attached to the IEP simply say that during her one-on-one supervision she will remain in a lap belt. It does not say that she must have one-on-one supervision at all times.

However, Marcia Braden testified that it was her intent in developing this IEP to provide that [redacted] was to have one-on-one training at all times during the academic aspect of her program. Specifically, Marcia Braden stated that in the classroom it was her intent that [redacted] be provided one-on-one service. Unless she is provided that service, [redacted] is so severely handicapped that it is almost impossible for her to stay on task.

It clearly would have been better for all concerned had Marcia Braden expressed clearly in the IEP itself [redacted] need for one-on-one supervision in the classroom, rather than at the hearing. However, she is the representative of the District who is primarily responsible for the IEP, and Ron Hage candidly testified that he relied heavily on Marcia Braden's opinion that the IEP required an aide in the program in deciding to put the aide back in the classroom in March, 1990. Hage should have reviewed the IEP before making the decision to cut the aide. However, even if he had read this IEP, he probably would not have ascertained that an aide is required, as Braden now contends.

However, the most convincing testimony that the IEP was violated came from Judy Van Valen, the teacher with the most direct contact with [redacted] on a day-to-day basis. One of the characteristics of service is "behavior management-restraining for running." An understanding of that characteristic of service can be derived from first educational need to "fade restraining during one-on-one training sessions." [redacted] behaviorial tendency to run presents a severe impediment to her education. She clearly cannot learn as well as long as the constant threat of running interferes with her education. Van Valen testified that, while the running commenced in the summer of 1989, before the aide was removed, it became worse after the aide was removed.

Furthermore, Van Valen drew a connection between [redacted] running and her lack of language since running may be a device which [redacted] uses to obtain attention and to vent her frustration at her lack of expressive language.

The lack of a speech therapist is not the focus of this hearing. Nevertheless, since [redacted] had no speech therapist from the beginning of the school year until April 4, 1990, the removal of the aide caused a serious dilution in her speech language program which had already been diluted by the lack of a speech therapist.

While the School District was delivering the service of "behavior management" by restraining [redacted] in a lap belt or tot-link, after the removal of the aide, the District was unable to attempt to modify that behavior by fading that restraining during one-on-one training sessions. That, combined with the dilution in [redacted] language program resulted in a worsening of her running behavior. Thus, the behavior management and speech language characteristics of service in the IEP were not being met after removal of the aide.

However, with the reinstatment of the aide on March 14, 1990, those characteristics of service were again being met. Since the training for all aides is merely on-the-job training, no specific educational requirements are necessary. No evidence was presented that the specific substitute aides who began working with [redacted] on March 14, 1990, were unqualified to implement a speech language program or the behavior management program. For that reason, the violation of the IEP which began on January 29, 1990, ceased on March 14, 1990, with the reinstatement of the aide.

The speech language therapist was not essential to the IEP. In fact, at the time this IEP was executed, the speech language therapist was not in place. Furthermore, a speech language therapist is not listed as a related service even though speech language is to be delivered directly as a related service. It is clear, however, that [redacted] eventually would need a speech language therapist since the program devised by the latest therapist could only be used for so long before it became obsolete. Therefore, the District's reinstatement of that service to [redacted], effective April 4, 1990, is commendable.

The hearing officer's conclusion that the IEP is violated is not affected by the principles announced in the United States Supreme Court Decision of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). That case defines a free appropriate public education when the parties cannot agree upon an IEP. However, when the parties have in place an existing IEP, that IEP must be complied with to provide the handicapped student with a free appropriate public education. 20 U.S.C. § 1401(a)(18)(D).

IV.

DECISION

Based upon the above findings and conclusions, it is the decision of the hearing officer that:

1. The ASIEP coordinator, Marcia Braden, shall design a program of compensatory education to be offered to [redacted] during her extended school year program in the summer of 1990 which shall be narrowly designed to compensate [redacted] for the lack of an aide in her classroom only during the period between

January 29, 1990 and March 14, 1990. Said program shall be proposed to the District no later than May 20, 1990. The District shall provide the compensatory education to [redacted] unless it objects to same. If it does so object, this hearing officer will hold a hearing to resolve any such objections. For that purpose only, the hearing officer maintains jurisdiction of this matter.

2. The Petitioner's request for costs is inappropriate at this stage of the proceeding because this hearing officer has no authority to assess attorneys' fees or costs under Part VII. B.9. on page 59 of the State Plan. Such attorneys fees and costs must be awarded by a court of competent jurisdiction.

Dated in Denver, Colorado this 27th day of April, 1990.

Joseph M. Goldhammer

Joseph M. Goldhammer
Hearing Officer
1563 Gaylord St.
Denver, CO 80206
(303) 333-7751

CERTIFICATE OF MAILING

The undersigned certifies that true copies of the foregoing FINDINGS AND DECISIONS have been placed in the United States mail, postage prepaid, this 27th day of April, 1990, addressed to:

Nancy Westmoreland, Esq.
Anderson, Johnson & Gianunzio
104 S. Cascade Ave., #204
Colorado Springs, CO 80903

Rita Ague
2603 Flintridge Drive
Colorado Springs, CO 80918

Dr. Myron Swize
Colorado Department of Education
State Offices Building
201 E. Colfax
Denver, CO 80203

Sharon A. Jackson

Case Number: S90:100

Status: State Level Review

Key Topics:
Scope of Due Process Request
Standard of Review
Individualized Educational Plan (IEP)
Aide Services

Issues:

- Whether hearing officer's decision exceeded scope of issues.
- Whether removal of aide constituted a violation of child's IEP.
- Whether evidence supported finding of regression.
- Whether hearing officer had jurisdiction to order compensatory education.
- Whether proposed compensatory education order is appropriate.
- Whether removal of aide constituted a change of placement.

Decision:

- Hearing officer's decision did not exceed scope of issues.
- Hearing officer and Administrative Law Judge have authority to grant all necessary relief including compensatory education.
- Removal of aide violated IEP but was not a change of placement.
- Compensatory services awarded.

Discussion:

- Formulation of IEP.
- Description of services and behavior management plan.
- Child received some educational benefit after removal of the aide.
- Child without aide for six week period.
- Aide involvement critical.

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Cont'd

- Level of individual services needed to achieve goals.
- How to calculate compensatory services to be offered.

BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. [redacted] 590:100

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF [redacted], by and through her parents, [redacted],

Petitioner,

v.

EL PASO COUNTY SCHOOL DISTRICT 11,

Respondent.[1]

On April 4, 1990, a due process hearing was held in this matter before a hearing officer pursuant to the Education for All Handicapped Children Act (20 U.S.C. Section 1400 *et seq.*, "The Act") and Part II, Section VII.B.4 of Colorado's State Plan.[2] The issues considered at that hearing were: (1) whether the removal of an aide from [redacted] ("Petitioner" or "Aspen") classroom by the El Paso County School District No. 11 ("District") constituted a change of placement, and (2) whether the removal of that aide violated [redacted] Individual Education Plan ("IEP"). On April 27, 1990, the hearing officer issued his decision in which he found that the removal of the aide from [redacted] classroom did not constitute a change of placement but did violate her IEP. The hearing officer thus ordered that a plan of compensatory education be designed and offered to [redacted] during her extended school year program in the summer of 1990.

The hearing officer further provided for the District to object to the compensatory education plan proposed. The District filed a Motion to Object to Compensatory Education and Request for Hearing, dated May 18, 1990. This objection was not resolved by the hearing officer. By letter of May 30, 1990, the District sought a state level review by the Colorado Department of Education of the decision of the hearing officer.[3] On June 4, 1990, the Colorado Department of Education requested the appointment of an Administrative Law Judge from the Colorado Department of Administration to conduct the state level review. On July 5, 1990, the Petitioner sought state level review by filing a cross appeal. Pursuant to the State Plan, Part II, Section VII.B.4.c, written argument was submitted by the District on July 9, 1990; by the Petitioner on July 16, 1990; and by the District on July 23, 1990. Additional oral argument was held on July 30, 1990, in Colorado

Springs. At that time, the District was represented by Nancy H. Westmoreland, Anderson, Johnson & Gianunzio. The Petitioner appeared pro se through [redacted], who was assisted by Rita S. Ague, Legal Assistant.

PRELIMINARY MATTERS

1. Prior to the oral argument, Respondent's Request for Rules and Guidelines for Oral Argument was filed. The District sought guidance regarding oral argument and also sought an order precluding the parties from arguing issues not raised on appeal. In particular, the District sought to preclude the Petitioner from addressing the issue of the absence of a speech language therapist for the 1989-90 academic year. The Petitioner had sought to address this issue both in the cross appeal and in written argument. At the due process hearing, the hearing officer precluded the Petitioner from raising this issue on the ground that it was not properly raised by the Petitioner's request for a hearing. The Petitioner contends that the request for hearing can reasonably be read to raise all potential violations of [redacted] IEP.

In the request for a due process hearing, the Petitioner indicated that the hearing was being sought for the following reasons: "1. the district's recent removal of an aide in our daughter's class constitutes a change of placement[,] 2. this change of placement violates our daughter's I.E.P. [and] 3. there was no staffing to allow for this change of placement". This request shapes the issues properly raised for the due process hearing.

While such a request should not be read so restrictively as to thwart the intent of the Petitioner, the request should also not be interpreted so expansively as to encompass issues not even mentioned. With this in mind, the Petitioner's request for a due process hearing can reasonably be read only to dispute the District's removal of an aide in [redacted] classroom. The request provides no clue whatsoever that the parents may actually be contesting the absence of a speech language therapist during the entire 1989-90 school year. Accordingly, the Administrative Law Judge precluded the Petitioner upon state level review from raising the issue of the lack of a speech language therapist during the 1989-90 school year. In relation to the remainder of the District's motion, the Administrative Law Judge believes that no other guidelines for oral argument, other than the previously agreed-upon limit of 30 minutes per party, are necessary and thus declines to impose any other rules.

2. In conjunction with its reply brief, the District filed a Motion to Strike various portions of the Petitioner's written

arguments on the grounds that they were immaterial, impertinent and/or scurrilous. The Administrative Law Judge recognizes that certain portions of Petitioner's written argument are not relevant to the issues upon state level review or seek to introduce new evidence. The Administrative Law Judge will disregard such portions of the Petitioner's written argument but declines otherwise to review Petitioner's written argument line-by-line in order to strike irrelevant, extraneous or newly-offered material.

3. The Petitioner moved to amend the transcript of the due process hearing on page 6, line 1, to reflect that the speaker was actually Mr. Gianunzio, not Ms. Ague. The District concurs that the transcript as it currently exists is inaccurate on this point. The Administrative Law Judge thus ordered that the transcript be amended to reflect Mr. Gianunzio as the speaker on page 6, line 1.

4. The parties had previously agreed to waive the requirement that the decision of the Administrative Law Judge be rendered within 30 days of the request for state level review. Although deadlines for written and oral argument had been established, the parties had not discussed a deadline for issuance of the decision upon state level review. At oral argument, the parties agreed that such decision must be issued by August 15, 1990.

ISSUES UPON STATE LEVEL REVIEW

The District raises five issues upon state level review:

1. Whether the hearing officer's Findings and Decision exceed the scope of the issue presented by Petitioner by addressing whether the aide's removal constituted a violation of the Petitioner's IEP.

2. Whether the hearing officer erred in concluding that the aide's removal constituted a violation of the Petitioner's IEP.

3. Whether the evidence at hearing supports a finding of Petitioner's regression.

4. Whether the hearing officer had jurisdiction to order compensatory education.

5. Whether the compensatory education proposed by Marcia Braden is inappropriate.[4]

The Petitioner sought to raise two issues upon state level review:

1. Whether the hearing officer erred in concluding that the removal of an aide from Petitioner's classroom did not constitute a change of placement.

2. Whether the District was required to provide Petitioner with a speech therapist during the entire 1989-90 school year.

The second issue has already been addressed by the Administrative Law Judge and found to exceed the scope of the Petitioner's request for a due process hearing. The sole issue raised by Petitioner's cross appeal is thus whether the hearing officer erred in concluding that the removal of an aide from Petitioner's classroom did not constitute a change of placement.

In addition, pursuant to the State Plan, Part II, Section VII.B.4.b, the Administrative Law Judge must determine and assure that the hearing procedure was in accordance with the requirements of due process. Neither party asserts any due process violation at the hearing.

SCOPE OF REVIEW

The standard of review to be applied upon state level review of a hearing officer's decision is not specified in the Act, its implementing regulations, or the State Plan. The Act and its regulations do specify, however, that the reviewing officer, in this case the Administrative Law Judge, shall make an independent decision upon completion of the review. 20 U.S.C. Section 1415(c) and 34 C.F.R. Part 300.510(5). This requirement of an independent decision by the reviewing officer has been found inconsistent with a standard whereby the hearing officer would be reversed on appeal only if the reviewing officer found that the decision was not supported by substantial evidence in the record. Tompkins v. Forest Grove School District #15, 740 P.2d 186 (Or. 1987). Furthermore, the state level review has been characterized as de novo review, preempting the state standard of review by preponderance of the evidence. Kruelle v. New Castle County School District, 642 F.2d 687, 692 (3rd Cir. 1981). In Geis v. Board of Education of Parsipanny-Troy Hills, 774 F.2d 575 (3rd Cir. 1985), the appropriate standard of review was described as an independent determination giving due weight to the administrative proceedings that have occurred. Accord Gregory K. v. Longview School District, 811 F.2d 1307 (9th Cir. 1987). This standard of review is indicated in part from the fact that the Administrative Law Judge must examine the entire hearing record. 34 C.F.R. Part 300.510(b)(1).

The Administrative Law Judge thus concludes that upon state level review, independent factual determinations are to be made, giving due deference to the findings of the hearing officer. The Administrative Law Judge must exercise discretion in giving appropriate weight to the hearing officer's findings. Town of Burlington v. Department of Education for the Commonwealth of Massachusetts, 736 F.2d 773, 791-92 (1st Cir. 1984), aff'd, Burlington School Committee v. Department of Education, 471 U.S. 359 (1985); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).

The Findings of Fact set forth below thus reflect this standard of review. To the extent that it was necessary to make findings from conflicting evidence, the Administrative Law Judge has made independent findings based on the record, giving due consideration to any findings of the hearing officer. As no additional evidence was permitted upon state level review, the Findings of Fact which appear below all reflect the status of this case as it existed at the time of the hearing.

FINDINGS OF FACT

1. Petitioner [redacted] was born on July 20, 1978, and at the time of the hearing was 11½ years old. [redacted] is a multiply handicapped and autistic child. Autistic children exhibit bizarre behavior such as biting and hand mannerisms, severe language deficits, echolalia (repeating back words heard), and an inability to interact with people. Although [redacted] can identify her wants and needs in simple sentences such as "I want candy," she has significant language deficits and no spontaneous speech. A long-term goal for [redacted] as an adult is the development of skills which would allow her to be placed in a sheltered workshop.

2. In approximately August, 1989, before the beginning of the academic school year, [redacted] developed the behavior of running away unless she was restrained or under extremely close supervision. This running behavior continued into the school year and the school setting and was of significant concern. [redacted] literally ran away from the location where she was to be (home, school, or after-school respite care). [redacted] ran from six to seven blocks to a mile before she was caught. [redacted] does not comprehend danger or have an awareness of hazardous conditions and runs into busy streets without heeding traffic. [redacted] running behavior is thus life-threatening.

3. At the time her most recent IEP was formulated in October of 1989, [redacted] had been in the Autistic Screening Instrument for Educational Planning ("ASIEP") program for approximately six years (1982 to 1985 and 1986 to present). Her placement in this program was interrupted for a year when her family moved to Texas. The component of the ASIEP program in which [redacted] participates is located at Buena Vista Elementary School, a District facility. Of the two ASIEP classrooms at Buena Vista, [redacted] is placed in the classroom for the most severely autistic students.

4. The ASIEP program started in approximately 1980 and is designed specifically to address the needs of autistic children. The program is housed and provided for by the District through an annual memorandum of understanding. This memorandum of understanding sets forth the parameters of the ASIEP program, including a maximum student-staff ratio of 2:1. The ASIEP program is unique in southern Colorado and, in fact, through intradistrict agreements, serves children from school districts other than the District. The District has hired Marcia Braden ("Braden"), an independent contractor, to serve as the ASIEP program coordinator. Braden has significant experience and expertise in the field of autism.

5. The ASIEP program is a very intense behavioral program with many related and direct services. The program is very individualized. The speech and language components of the program are critical. As language ability increases, maladaptive behaviors of autistic students are likely to decrease.

6. On October 24, 1989, a triennial review of [redacted] educational placement was conducted and resulted in the development of an IEP for [redacted]. This IEP, which determines the services to be provided to [redacted] at all times relevant herein, was developed jointly by various professional staff members, including Braden, and [redacted] parents. Braden, the principal representative of the District in formulating the IEP, actually completed [redacted] IEP forms.

7. In general terms, in describing [redacted] current status, the IEP indicates that she is attending ASIEP with little support service. By this the IEP indicates that [redacted] was receiving a reduced level of speech and language services and of occupational therapy services. [redacted] IEP describes the services which are to be provided to her and specifies the size of group and amount of time to be devoted to these services. [redacted] requires independent or small group supervision at all times. Among the services described in the IEP are the following:

1. Placement in the ASIEP program in individual or small groups for the entire day.
2. Speech and language services as needed in individual or small groups.
3. Behavioral management, including restraining for running, all day in individual or small groups.
4. Extended school year (summer school) as needed in individual or small groups.

8. The IEP also identifies [redacted] needs, including fading or gradually phasing out of restraining during one-on-one sessions and language as a primary focus. The IEP further establishes annual goals. These include language goals and a goal of decreasing running by 90%.

9. The Behavior Modification and/or Discipline Section of [redacted] IEP states that a Behavioral Management Policy is to substitute for the regular school conduct and disciplinary rules. This policy thus provides the standard for student conduct in [redacted] case. This substitution was made to avoid disciplining [redacted] for behavior innate to her handicapping condition. When the general student conduct and disciplinary policies are not be followed, an addendum to the IEP must be completed. The addendum completed for [redacted] IEP, however, does not address the issue of behavior management but rather serves as an extra sheet for continuing other sections of the IEP which could not be accommodated on the form itself.

10. The behavior management policy is a generic umbrella policy which was implemented by an untitled document ("behavioral document") dated September 20, 1989, which describes procedures for decelerating [redacted] inappropriate running behavior. This behavioral document specifies that while in transit, [redacted] is to be kept on a tot-link[5] with an adult present and during all other times is to be in a lap belt with one-on-one supervision. The behavioral document also indicates that due to the severity of her running behavior, the running behavior would not be charted. The restraint specified in this behavioral document had been authorized by [redacted] parents by means of a letter dated December 19, 1989. This letter, along with the behavioral document, is appended to [redacted] IEP.

11. The record contains conflicting evidence regarding whether this behavioral document is a part of [redacted] IEP. Ronald Hage ("Hage"), Director of Special Education for the District, testified that, although he did not know whether this document was considered to be the behavioral management policy referenced on the IEP, he did not believe that it formed a part of the IEP. In fact, this behavioral document is a working document kept on a clipboard with the student at all times and is not filed away with the IEP. The document was, however, discussed at the IEP staffing and was considered by both Braden and [redacted] parents to be a part of the IEP. Braden also intended to incorporate this behavioral document in the IEP and considered it a part of the IEP.

12. The Administrative Law Judge need not determine whether this behavioral document was formally a part of the IEP. The behavioral document clearly was not modified by the IEP and was an integral part of the formulation of the IEP. It thus serves as an interpretive aide.

13. During the time period just prior to January 29, 1990, [redacted] ASIEP classroom consisted of four students, one teacher (Judy Van Valen), and two aides. Aides function under the direction of a certified teacher and carry out many of the training components of a student's program. Aides implement the programs written by teachers and function under the direction of both the teacher and Braden. In the actual provision of service, the function of aides is largely interchangeable with that of a teacher.

14. One of the two aides in [redacted] classroom was assigned to work exclusively with one student. That student was placed in the ASIEP program from outside the District. The student's tuition and the aide's salary were paid for by that school district. Although that specially designated aide was always in the classroom, in determining the student-staff ratio in [redacted] classroom, it is appropriate to exclude both that aide and the student served by the aide. Thus the ratio of students to staff in [redacted] classroom prior to January 29, 1990, was 3:2.

15. [redacted] and the other students in her class switch from one adult to another at approximately 30-minute intervals. The aide in [redacted] classroom provided one-on-one instruction to [redacted] and helped provide close supervision to prevent her from running. At all times when [redacted] was moved from room to room, was going to the bathroom, or was on community excursions, she was on a tot-link. In addition, when [redacted] was in the classroom, she was restrained in her chair with a lap belt and with close staff supervision.

16. Prior to the 1989-90 academic year, [redacted] had received direct services from a speech therapist, a full-time person who provided speech and language services to her four times per week for 30 minutes per session. At the beginning of the 1989-90 school year, however, this staff position was vacant because the District had been unable to hire a qualified speech therapist. The level of speech language services for the 1989-90 academic year was thus reduced from the prior year's level. The aide played a critical role in continuing these services in the 1989-90 school year. The aide was largely responsible for implementing the programs previously designed by the speech therapist. At the IEP staffing, Braden assured [redacted] parents that, despite the current lack of a speech therapist, an aide would effectuate the speech and language program for [redacted] until a speech therapist could be hired.

17. Due to a budget deficit in the 1989-90 academic year, the District's Board of Education implemented budget cuts totalling $4.1 million dollars. Certain budget cuts in the District's special education program were required. Acting upon the recommendation of Hage, the Board decided to eliminate several aide positions, including the one undesignated aide in [redacted]

classroom. Hage's recommendations reflect a good faith effort to make the cuts where they would produce the least harm and where the lowest student-staff ratios existed. The cut of the aide in [redacted] classroom was effectuated on January 29, 1990. As of that date, excluding again the aide designated exclusively for the one student and that student, [redacted] class consisted of three students and one teacher, with a student-staff ratio of 3:1.[6]

18. It is undisputed that [redacted] continued to receive some educational benefit after the removal of the aide. [redacted] needs constant attention in a one-on-one or small group setting to keep her on task. The removal of the aide from [redacted] classroom did, however, significantly decrease the speech language services provided to [redacted]. The decrease in one-on-one instruction negatively impacted [redacted] speech and language programming and behavior because there were fewer personnel to implement these programs. As the frequency of the programs decreased, [redacted] was receiving fewer opportunities to complete programs. [redacted] thus did not meet the programs as quickly as she had when the aide was in her classroom. For example, a program completed by [redacted] in two-or-three days prior to January 29, 1990, might require four-or-five days thereafter. The aide's removal thus made it virtually impossible to adequately address [redacted] educational needs and meet her goals.

19. In addition, the one-on-one instruction actually provided after January 29, 1990, was diluted because the teacher was constantly interrupted due to various crises requiring her intervention with other students. [redacted] speech and language progress thus slowed in comparison with her rate of learning prior to January 29, 1990.

20. The removal of the aide also caused an increase in the amount of time [redacted] spent restrained by a lap belt in her chair. The increased lap belt restraint negatively affected [redacted] learning of the behavior of sitting and attending and also negatively affected the District's ability to fade or reduce the amount of restraining. In order to teach [redacted] not to run and to fade the restraint, an adult providing one-on-one supervision is necessary. The adult may then remove the lap belt for two or three minutes, heavily reinforce sitting behavior, and physically restrain [redacted] if she attempts to run. The existence of the aide was thus critical in implementing behavioral management services to [redacted]. The aide's removal increased [redacted] running behavior and made it virtually impossible adequately to address [redacted] behavioral needs and goals. The decrease in supervision resulting from the aide's removal, coupled with [redacted] awareness of this, resulted in this increase. [redacted] does not run when she is closely supervised in a one-on-one situation.

21. Both Braden and Van Valen testified that [redacted] has exhibited regression[7] as the result of the aide's removal.

Braden's testimony was based on her cursory review of data available on [redacted] After the hearing officer admonished Braden not to guess about the existence of regression by [redacted], she again testified that regression occurred. Van Valen testified from her direct experience with [redacted]. The Administrative Law Judge finds that [redacted] regressed in both speech and language and behavioral management as the result of the aide's removal.

22. Prior to January 29, 1990, [redacted] was receiving 2 to 2½ hours a day of one-on-one direct instruction during a school day which lasted approximately six hours. Approximately once a week, that one-on-one instruction time was increased to 3 to 4 hours due to a community outing. With the removal of the aide, [redacted] received only 1½ hours a day of one-on-one instruction, a decrease of one-half to one hour per day.[8] The record contains no evidence that [redacted] parents were able to or did provide alternative one-on-one instruction to [redacted] after January 29, 1990, and their request for compensatory educational services, in lieu of reimbursement for services provided, strongly suggests that none was provided.

23. The ASIEP program keeps a detailed account of services delivered and progress made by students. Very specific data is maintained for each student including, for example, the recording of a student's correct or incorrect answer to each question. From this data, it would be possible to measure accurately the degree of regression experienced by [redacted] and to determine specifically which programs would need to be taught to [redacted] to remediate this situation. The record, however, contains no such data regarding [redacted] regression.

24. Due to inherent uncertainties in the education process, one cannot predict with certainty the extent to which compensatory education provided to [redacted] would redress the regression experienced.

25. After the aide was removed from [redacted] classroom due to budgetary cuts, Braden, who had previously voiced her opposition to such a move, informed Hage for the first time that she believed such a cut violated [redacted] IEP.

26. On March 14, 1990, Hage replaced the aide who had been cut from [redacted] classroom. The decision by Hage to replace the aide was the result of the concerns expressed by Braden and the existence of federal funds to pay for the new aide. While it is the District's intent to have a permanent aide in [redacted] classroom, barring program changes, at the time of the hearing this position had been filled successively by three temporary substitute aides.[9]

27. An aide was thus removed from [redacted] classroom for the six-week period from January 29, 1990, to March 14, 1990. This is the time period at issue in this state level review.

28. [redacted] IEP does not have a specific requirement for an aide. In formulating the IEP and its specification of individual services, the existence of an aide was assumed and the resulting significant amount of one-on-one services was intended. Braden believes that the IEP requires an aide for [redacted]. The IEP does implicitly require a significant amount of one-on-one services to [redacted].

29. The extended year or summer school program provided for [redacted] in her IEP is a maintenance program to prevent backslipping and to maintain her at the same level over the summer months as she exhibited at the end of the school year. It is a six-week program with 3½ hours per day for four days per week.

30. In response to the decision of the hearing officer, Braden developed a compensatory education plan for [redacted]. Based on her calculation that [redacted] had lost approximately 1.5 hours per day of one-on-one instruction for the period from March 29, 1990, to March 14, 1990, Braden determined that [redacted] had lost 40 hours of one-on-one instruction. Braden thus proposed to supplement [redacted] summer school instruction with an additional 40 hours of direct one-on-one teaching in a language-based curriculum.

31. A review of the transcript in this matter reveals that both parties were afforded due process during the due process hearing.

DISCUSSION

I. District's Issues on State Level Review

1. Propriety of hearing officer's consideration of whether the aide's removal constitutes a violation of Petitioner's IEP. The District contends that the Petitioner's request for a hearing did not raise the issue of whether the aide's removal violated [redacted] IEP. The District asserts that it was prejudiced and precluded from introducing evidence regarding the IEP violation issue because it was not fairly notified by the request that such would be an issue in the hearing. Petitioner contends that this issue was fairly raised by the request for hearing and that any ambiguity in that request is due only to lack of legal drafting expertise.

The Petitioner's request for hearing has been previously quoted in this decision. The thrust of the request is a disagreement with the District's removal of the aide from Aspen's classroom. The request further characterizes this removal as a change of placement and then asserts that that change of placement constitutes an IEP violation. Whether Petitioner's characterization of the aide's removal as a change of placement is correct, it is apparent that Petitioner is contending that that removal constitutes both a change of placement and a violation of the IEP. A reasonable interpretation of the hearing request thus results in the conclusion that it fairly raised the issue of whether the aide's removal violated [redacted] IEP. This issue is thus properly addressed at the due process hearing, and the hearing officer's decision on this issue is further properly raised by the District on state level review.

2. Removal of the aide constitutes a violation of [redacted] IEP. The requirements of [redacted] IEP are disputed by the parties. The IEP itself does not contain language explicitly requiring an aide for [redacted]. It does dictate that both speech and language services and behavior management services, including restraining for running, be provided to [redacted] individually and in small groups. The issue then becomes whether the individual services required by the IEP were actually provided after the aide was removed.

The record establishes that the aide in [redacted] classroom was critical in effectively implementing the speech and language program and the behavioral management program. The elimination of that aide made it virtually impossible to provide adequate one-on-one instruction to address [redacted] needs and to achieve the goals established by the IEP. By virtually eliminating the possibility of addressing needs and achieving the IEP goals, the removal of the aide thus violated [redacted] IEP.

The speech language program being provided to [redacted] as of January 29, 1990, was already being operated at a service level below that of the prior year due to the lack of a speech therapist, who had responsibilities not only for designing the program to be used but also helped implement it through two hours of one-on-one instruction each week. The aide played a significant role in implementing the program during the 1989-90 year, and the removal of the aide effectively halved the staff available to implement that program. The actual one-on-one instruction to [redacted] was not fully halved by the aide's removal, but the quality of the one-on-one instruction which occurred after the aide's removal was diminished. While a student's actual progress is not necessarily an indication of whether the IEP has been violated, [redacted] regression in speech and language is a further indication of the fact that the aide's removal made the achievement of [redacted] speech and language goals virtually impossible.

Regarding [redacted] behavior management program, including the fading of restraining, the record establishes that this service could only be implemented effectively through one-on-one training. Given the severity of [redacted] behavior, a staff person was required to provide close supervision and trials of removing the lap belt restraint. [redacted] increase in the running behavior further supports the fact that the aide's removal made the achievement of her behavior management needs virtually impossible.

It is also clear that the IEP required a level of individual services as needed to provide a reasonable opportunity for [redacted] to address her needs and meet her goals. While the IEP does not specify the amount of individual versus small group services to be provided, it contemplated a significant amount of one-on-one services. First, in designing [redacted] educational placement, the IEP staffing participants intended that [redacted] would receive significant one-on-one services and assumed the existence of an aide in formulating the IEP's specification of individual services. [redacted] handicapping condition is so severe that it is almost impossible for her to stay on task without this one-on-one service. Second, Braden's opinion that the IEP requires an aide is also of note. Although Braden was only one of several persons involved in the IEP development process, as its drafter, her interpretation of the language reflected is particularly significant. Third, the behavioral document dated September 20, 1989, lends support to the conclusion that the IEP required significant one-on-one services for [redacted]. While this document may or may not be part of the official IEP, it was certainly referenced in the IEP and its provisions were an integral part of the development of the IEP. This document provides that, while not in transit, [redacted] shall be in a lap belt and have one-on-one supervision. While the District argues that the later IEP should govern over the earlier behavioral document, the Administrative Law Judge concludes that the documents must be read together and support the requirement for significant one-on-one services for [redacted]. Fourth, the entire ASIEP program operated under an agreement that the student-staff ratio would not exceed 2:1.[10]

3. Existence of Regression by [redacted] as the Result of the Aide's removal. The District apparently asserts that, without clinical data in the record to document [redacted] progress after the removal of the aide, the testimony of both Braden and Van Valen to the effect that [redacted] had regressed in various areas is pure speculation which cannot form the basis of a finding of regression. While the lack of empirical data to support a finding of regression may affect the weight to be afforded the opinions expressed by Braden and Van Valen, it does not reduce those opinions to mere speculation. Braden's opinions were based on a cursory review of the available data. When cautioned by the hearing officer that a mere guess on the subject of regression were unacceptable, Braden restated her professional opinion that regression had indeed occurred. While a quantification and precise description of the amount of regression would not be

possible without review of the data, the fact of regression was established by the testimony of both Braden and Van Valen.

The District in essence asks that the testimony of Braden and Van Valen be found incredible. Credibility determinations are most appropriately made by the hearing officer, who actually heard the testimony at hearing, rather than by a reviewing officer. Given the difficulty of reassessing credibility based on a "cold" transcript and the consistent and convincing testimony of the only two witnesses who addressed this issue, the Administrative Law Judge determines that the record as a whole establishes that [redacted] regressed as a result of the aide's removal.

4. Jurisdiction to Award Compensatory Education. The District asserts that any award of compensatory education, which it likens to damages, is unauthorized by either the hearing officer or the Administrative Law Judge. The District contends that compensatory education can only be awarded upon judicial review.

The Act is silent on the issue of whether compensatory education may be awarded at the administrative level. The Act does indicate that upon judicial review of a state or local educational agency decision, courts may "grant such relief as the court determines is appropriate." 20 U.S.C. Section 1415(e)(2). In Burlington School Committee v. Department of Education, 471 U.S. 359 (1985), the United States Supreme Court established the availability of compensatory education under the Act. The Court ruled that local authorities could be made to reimburse parents for the costs of special education that should have been provided under the Act. Such reimbursement was not considered to be damages but merely a belated payment of expenses which should have been borne all along.

The District here seeks to distinguish Burlington because it dealt with retroactive reimbursement for services provided at the parents' expense, and not with an order for compensatory education services. Such a distinction is inappropriate in the context of the Act. The ability or inclination of [redacted] parents to provide alternative educational services during the six-week period when the aide was removed is not dispositive of the existence of relief in this matter. The District cannot escape liability simply because no alternative services were provided to [redacted]. Meiner v. State of Missouri, 800 F.2d 749 (8th Cir. 1986) (availability of compensatory education services to remedy denial of educational services); White v. State of California, 240 Cal. Rptr. 732, 195 Cal. App. 3rd 452 (1987), (compensatory education was an appropriate remedy for the denial of educational services under the Act).

The authority to award compensatory educational services at the administrative level is not as clear. A number of state hearing officers have awarded such services. In re Monica J., 1983 EHLR DEC. 504:355 (SEA MA 1983) (child deprived of speech and sign education during a significant portion of the school day was awarded a half-day summer program as compensation); A.R. v. Cherry Hill School District, 1988-89 EHLR DEC. 401:142 (SEA NJ 1988) (lack of meaningful vocational training denied the student an appropriate education and warranted compensatory education for an additional school year); W.V. v. Cranford Board of Education, 1988-89 EHLR DEC. 401:179 (SEA NJ 1988) (significant regression in the student's educational advancement warranted compensation in the form of an extended school year).

Given the Act's authorization of the courts to grant all appropriate relief and absent any express limitations on a hearing officer's or Administrative Law Judge's authority to grant relief, there is a necessary implication that an administrative officer has the same power to grant all appropriate relief as is granted to district courts under the Act. David W. v. Vidor Independent School District, Case No. 063-SE-283, 1983-84 EHLR DEC. 505:119 (SEA TX 1983). The Administrative Law Judge concludes that authority exists under the Act for the award of compensatory education at the due process hearing and upon state level review.

5. The propriety of compensatory education plan proposed by Braden. The District objects to the compensatory education plan proposed by Braden for a number of reasons. First, the District contends that the proposal's requirement of "extended time in [[redacted]] Summer School placement" exceeds the hearing officer's order that the compensatory education be provided "during her extended year program." During oral argument the parties agreed that, due to timing, it would not be possible to provide compensatory education to [redacted] within the summer program but that the compensatory education proposed could easily be adapted to the regular school year. This change in circumstances may well eliminate any objection by the District, since it appears likely that the additional one-on-one instruction proposed for [redacted] compensatory education could be provided within the regular school day. In providing an independent decision upon state level review, the Administrative Law Judge has concluded that the additional one-on-one instruction should be provided to [redacted] if at all possible within the regular school day.

Second, the District disputes Braden's assumption that [redacted] lost 1.5 hours per day of one-on-one instruction. The Administrative Law Judge found that the aide's removal resulted in a reduction of one-half to one hour per day of one-on-one instruction, as well as a dilution of the quality of that one-on-one instruction. The Administrative Law Judge thus determines that Braden's proposal is based on a faulty assumption and that one hour per school day between January 29, 1990, and March 14, 1990, should be the basis for the proposal. The record does not reflect, however, the actual number of school days during this period. There are 40 week days in this period, but some of these may not have been school days. The District's objection is thus upheld to the extent that the compensatory education proposed shall be the total number of hours derived from multiplying one hour per school day by the number of school days beginning January 29, 1990, through March 13, 1990.

Third, the District seeks to object to the compensatory education proposal based on its lack of specifics. The District argues that the proposal must address the specifics of regression and the resulting problems. This objection was not raised by the District in its Motion to Object to Compensatory Education filed with the hearing officer. The parties did agree that the District's objections would be an issue on appeal because of the inability to resolve those objections prior to the initiation of the state level review. Under these circumstances, it is appropriate to limit the District's objections to those previously raised. The District is thus precluded from raising this objection. Even assuming, however, that this objection is proper on appeal, the District's objection is not well-founded. While Braden's proposal is certainly general and would benefit from a specific analysis of the areas of regression, it is not so deficient as to warrant rejection by the Administrative Law Judge. While some procedure will certainly be necessary to work out the specific content of the additional one-on-one instruction proposed, in the interests of providing an expeditious resolution of this matter, the Administrative Law Judge rejects the District's objection. Despite the inability to predict with certainty the results of the compensatory education awarded, it is nonetheless appropriate to attempt to remediate the negative effects of the aide's removal on Aspen's education

II. Petitioner's Issues On Cross Appeal

The Petitioner raises the issue of whether the removal of the aide constitutes a change in placement. While this is a very close issue and it appears that a change in placement may have occurred in this case, the Administrative Law Judge need not address this issue. The finding that [redacted] IEP has been violated makes any ruling on the change of placement unnecessary. Appropriate relief results from the determination of an IEP violation.

CONCLUSIONS OF LAW

1. The District's removal of an aide from the Petitioner's classroom from January 29, 1990, until March 14, 1990, violated Petitioner's IEP.

period. There are 40 week days in this period, but some of these may not have been school days. The District's objection is thus upheld to the extent that the compensatory education proposed shall be the total number of hours derived from multiplying one hour per school day by the number of school days beginning January 29, 1990, through March 13, 1990.

Third, the District seeks to object to the compensatory education proposal based on its lack of specifics. The District argues that the proposal must address the specifics of regression and the resulting problems. This objection was not raised by the District in its Motion to Object to Compensatory Education filed with the hearing officer. The parties did agree that the District's objections would be an issue on appeal because of the inability to resolve those objections prior to the initiation of the state level review. Under these circumstances, it is appropriate to limit the District's objections to those previously raised. The District is thus precluded from raising this objection. Even assuming, however, that this objection is proper on appeal, the District's objection is not well-founded. While Braden's proposal is certainly general and would benefit from a specific analysis of the areas of regression, it is not so deficient as to warrant rejection by the Administrative Law Judge. While some procedure will certainly be necessary to work out the specific content of the additional one-on-one instruction proposed, in the interests of providing an expeditious resolution of this matter, the Administrative Law Judge rejects the District's objection. Despite the inability to predict with certainty the results of the compensatory education awarded, it is nonetheless appropriate to attempt to remediate the negative effects of the aide's removal on Aspen's education

II. Petitioner's Issues On Cross Appeal

The Petitioner raises the issue of whether the removal of the aide constitutes a change in placement. While this is a very close issue and it appears that a change in placement may have occurred in this case, the Administrative Law Judge need not address this issue. The finding that [redacted] IEP has been violated makes any ruling on the change of placement unnecessary. Appropriate relief results from the determination of an IEP violation.

CONCLUSIONS OF LAW

1. The District's removal of an aide from the Petitioner's classroom from January 29, 1990, until March 14, 1990, violated Petitioner's IEP.

2. This is the final decision on state level review. Colorado State Plan, Part B, Section VII.B.4.D.

DECISION

In order to compensate [redacted] for the violation of her IEP by the District's removal of an aide for approximately six weeks during the 1989-90 school year, the program of compensatory education proposed by Braden, modified as to the total of number of hours required as specified in this decision, shall be offered to [redacted] in her regular school year program. In designing the specifics of the one-on-one instruction to be provided, that program shall be designed to compensate [redacted] for the lack of an aide in her classroom only during the period between January 29, 1990, and March 14, 1990. That program of compensatory education shall begin with the commencement of the 1990-91 school year and shall if at all possible be carried out within the regular school day.

DATED AT: Denver, Colorado
August 5, 1990.

Nancy Connick

NANCY CONNICK
Administrative Law Judge

FOOTNOTES

1/ In the interests of clarity, the designation of the parties as Petitioner and Respondent, used during the due process hearing, has been continued upon state level review. Both parties have requested review of the hearing officer's Findings and Decision.

2/ The Colorado State Plan is prepared by the Colorado Department of Education, as required by the Act, to implement the provisions of the Act.

3/ Colorado State Plan, Part II, Section VII.B.4.

4/ The parties are in agreement that the issue of the propriety of the compensatory education plan proposed by Marcia Braden is properly raised upon state level review. Although the hearing officer in his Findings and Decision sought to maintain jurisdiction over any objections by the District to the compensatory education plan proposed and the District did so object, it was not possible to resolve that objection prior to the matter coming before the Administrative Law Judge upon state level review. The parties thus concur that this issue may be addressed by the Administrative Law Judge.

5/ A tot-link is a tether attached at one end to a staff member and at the other to [redacted].

6/ On a sporadic and unspecified basis during the period of January 29, 1990, to March 14, 1990, an aide did assist in [redacted] classroom. For the majority of the time, however, the student-staff ratio was 3:1. In times of crisis, the designated aide allocated to the single student did assist in controlling other students in [redacted] classroom. It is not fair to factor this episodic assistance into the student-staff ratio. The evidence thus supports a student-staff ratio of 3:1.

7/ The term "regression" is used throughout this decision to indicate both that [redacted] rate of learning decreased in speech/language and in behavioral management during the time the aide was removed from her classroom and that her running behavior worsened.

8/ Although the number of community outings decreased after January 29, 1990, the reason for the decrease is uncertain. While Van Valen attributed the decrease to interfering student behaviors, the record does not establish that this was caused by the aide's removal. Since the frequency of outings after January 29, 1990, was not specified and the decrease cannot reasonably be attributed to the aide's removal, it would be impossible and inappropriate to factor the lost community excursion time into the calculation of the decrease in one-on-one time resulting from the aide's removal.

[9] The reinstatement of a substitute aide, rather than a permanent one, is not an issue in this proceeding. The parties are in agreement that any change of placement or IEP violation caused by the aide's removal ended on March 14, 1990, when a new aide was placed in [redacted] classroom.

[10] The designation in [redacted] IEP that she is receiving little support service is not inconsistent with this finding.

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW by placing the same in the U.S. Mail, postage prepaid, at Denver, Colorado to: Nancy H. Westmoreland, Esq., Anderson, Johnson & Gianunzio, 104 S. Cascade Avenue, Suite 204, Colorado Springs, CO 80901-0240; [redacted] and [redacted], [redacted], [redacted], [redacted]; Fred Smokoski, Assistant Director of Special Education, Colorado Department of Education, 201 East Colfax, Denver, CO 80203, on this 3rd day of August, 1990.

Peggy Bjorgaard
Secretary to Administrative Law Judge

Case Number: L90:101

Status: Impartial Hearing Officer Decision

Key Topics:

- Extension of 45 Day Timeline
- Impartiality of Hearing Officer
- Education Records
- Individualized Educational Plan (IEP)
- Free Appropriate Public Education (FAPE)
- Notice
- Short Term Objectives
- Parental Involvement
- Educational Benefit
- Compensatory Education
- Attorney Fees

Issues:

- Hearing officer authority regarding 45 day timeline.
- Whether hearing officer's personal situation renders him unable to be objective.
- Whether district failed to develop, design or implement an IEP for the student which was reasonably calculated to confer reasonable educational benefit.
- Whether FAPE was denied because IEP was procedurally deficient.
- Whether district denied parents the right to meaningful participation in the development of the IEP.
- Whether district gave parents appropriate notice of development of short term objectives.
- Whether hearing officer can award compensatory education.
- Entitlement to parents of attorney fees.

Decision

- Hearing officer has no authority to extend 45 day timeline without consent of both parties.
- Hearing officer declines to disqualify himself.
- Standardized test protocols are education records and thus, accessible to parents.

Case Number: L90:101
Cont'd

- The basic floor of opportunity for profoundly and severely impaired children is educational programming reasonably calculated to permit the child, within the limits of his or her handicap, to become self-sufficient.
- IEP not appropriately implemented and not reasonably calculated to confer educational benefit.
- No authority for hearing officer to grant compensatory education.
- State plan permits hearing officer to award attorney fees.
- Parents were denied meaningful opportunity to participate in IEP development.
- Order independent evaluation.

Discussion:

- Basis in Family Educational Rights and Privacy Act and EHA for parents rights to access school education records and these statutes modify state law.
- Principles enunciated in Rowley guide any determination of what constitutes FAPE for a particular child.
- Details numerous cases looking at what is an appropriate education for a particular child.
- Statutes recognize importance of parental involvement in development of IEP.
- District failed to understand nature of the need for basic data of performance levels so that attainment of goals could be measured.
- District's lack of response to parent requests.
- Analysis of pertinent parts of IEP documents as they relate to legal requirements, parts included:

  present level functioning;
  annual measurable goals;
  short term objectives;
  services to be provided;
  date of service commencement and duration; and
  evaluation criteria

MAY 29 1990

STATE OF COLORADO
BEFORE AN IMPARTIAL HEARING OFFICER
COLORADO DEPARTMENT OF EDUCATION NO. [redacted] L90:101

FINDINGS and DECISION OF THE IMPARTIAL HEARING OFFICER

In the Matter of the Educational Placement of a Student,

S.L.B.,

Concerning

ARAPAHOE COUNTY SCHOOL DISTRICT NO. 6 / LITTLETON PUBLIC SCHOOLS,

and

[redacted]. and [redacted], parents and co-guardians of the Student.

This matter is presented upon the "Request for Due Process Hearing" delivered to the Littleton Public Schools (hereafter referred to as "District") by the Parents and Guardians of the Student (hereafter the Parents, W.R.B. and N.R.B., and the Student, S.L.B., shall be referred to as "Parents" and "Student", respectively), on April 13, 1990. The subsequent hearing and this decision are pursuant to the provisions of the Education for All Handicapped Children's Act of 1975, as amended (20 U.S.C. 1401 et seq., hereafter sometimes referred to as "EHA"), and Colorado's Exceptional Children's Educational Act (C.R.S. 1973, Sections 22-20-101 et seq., hereafter sometimes referred to as "CECEA").

I. PROCEDURAL BACKGROUND

A. EHA; CECEA; and COLORADO'S STATE PLAN

The EHA, as applied in this proceeding, is P.L. 94-142, as amended by the Handicapped Children's Protection Act of 1986, and as codified in 20 U.S.C. 1401 et seq. Its purpose is "... to assure that all handicapped children have available to them, ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected ..."(EHA Sec. 1400(c)) The EHA mandates that the Office of Special Education and Rehabilitation Services in the Department of Education promulgate regulations by which the EHA be carried out, and those regulations are contained at 34 C.F.R. Part 300 (hereafter referred to as "Fed. Regs.").

The purpose of the CECEA, which pre-dates the EHA, is " ... to provide means for educating those children who are exceptional the State of Colorado has promulgated its regulations for Administration of the Exceptional Children's Educational Act (1 CCR

301-8, 2220-R-1.00 et seq., hereafter referred to as "State Regs").

Pursuant to the provisions of the EHA, the Colorado Department of Education (hereafter referred to as "CDE") has submitted its Fiscal Year 1989-91 State Plan, dated June 1988 (hereafter referred to as "State Plan") to the U.S. Department of Education. Pursuant to the EHA and the State Plan, the District has submitted its Comprehensive Plan and Procedures Manual, Fourth Revision, dated January 1986 (in effect for school years 1986-87 through 1988-89) and its Comprehensive Plan and Procedures Manual, Fifth Revision, dated June 30, 1989 (in effect for school years beginning 1989-90) to the CDE.

The above-referenced statutes, regulations and plans are given the effect of law and have been applied in this proceeding and decision.

B. 4/13/90 REQUEST FOR HEARING & "45 DAY RULE REQUIREMENT"

Upon receiving a written request for a hearing under the EHA, the District was mandated to conduct a "due process hearing" and insure that a written decision would be made " ... not later than 45 days after the receipt of a request for a hearing" (Fed. Regs. 300.512). The parents' request for hearing was received April 13, 1990. The forty-fifth day following the day of request is May 28, 1990, a National Holiday. The Hearing Officer determined that a decision in this matter on or before May 29, 1990 would comply with the law.

The District filed its "Request to Delay Hearing, and to Grant Specific Extension of Time Beyond 45 Days; Request for Forthwith Hearing", on April 30, 1990. The Hearing Officer, finding no agreement of the Parties to such delay or extension, and no discretion under provisions of the State Plan (Part II, VII. B. 2. a.), denied that request on May 1, 1990 without a hearing.

C. HEARING OFFICER DESIGNATION & QUALIFICATIONS

The Hearing Officer was designated to serve in this proceeding, in accord with the provisions of the State Plan at Part II, VII, B. 3. b., on April 27, 1990. That is, from a list of hearing officers approved by CDE, five available and qualified hearing officers were named. The Hearing Officer was determined by each Party, in turn, eliminating hearing officers from that list, until only one remained.

The District, on May 2, 1990, filed its "School District's Motion to Disqualify Impartial Hearing Officer". Said Motion was based upon the District's contention that the Hearing Officer is the parent of a diagnosed Attention Deficit Disorder child, and therefore a person having a personal or professional interest which would conflict with his objectivity in the hearing. The District's argument included references to certain special interest groups promoting the rights of Attention Deficit Hyperactive Children and their contentions that such children, as a class, deserve specific identification and recognition as "handicapped children" under the EHA.

Without a hearing, the Hearing Officer, on May 2, 1990, denied the District's Motion, stating:

> "This Hearing Officer's Child, may or may not have one of the conditions specified in the Rules for the Administration of the Exceptional Children's Educational Act, but is not diagnosed as having Attention Deficit Hyperactivity Disorder, does not require special education nor related services, and is not a "handicapped child". This Hearing Officer has no personal nor professional interest in the outcome of this matter that would affect his objectivity."

D. HEARING PROCEDURES PER EHA, FED. REGS. & STATE PLAN

This hearing has been conducted pursuant to the following provisions of the EHA:

> Procedural Safeguards
>
> (a) Establishment and maintenance
> Any State educational agency, . . . which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.
>
> (b) Required procedures; hearing
> (1) The procedures required by this section shall include, but shall not be limited to -
>
> * * *
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.
>
> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Further guidelines for the conduct of this hearing are contained in: Fed. Regs. 300.506, 507 and 508; and the State Plan at Part II, VII, and of particular importance is the following:

> The hearing officer shall:
> (1) Set forth the procedures and timelines to be followed during the hearing. (State Plan, Part II, VII, 2. e.)

This Hearing Officer set forth and sent to the Parties, on April 27, 1990, his Notice of Pre-Hearing Procedure, which advised the Parties of requirements for a pre-hearing conference and pre-hearing disclosures of exhibits and witnesses, and contained general advisements to the Parents of the Student.

II. THE HEARING

A. TIMING

In accord with the Notice of Pre-Hearing Procedure, the Hearing commenced May 9, 1990 at 1:00 p.m., at the District Administration Building, 5776 S. Crocker, Littleton, Colorado. The hearing continued through May 10, 11, 12, 14, 15, 16, 17, and 18, and evidence was concluded later afternoon, on Saturday, May 19. Closing arguments were heard Monday, May 21, 1990.

B. WITNESSES

In accord with the Pre-Hearing Statements of the Parties, the following witnesses testified:

Ann Morrison Clement, Director of Special Education for the District;

Karen Coffey-Siegel, PACE teacher for the Student 1989-90;

Ian R. Pumpian, Ph.D. with Special Committee Degree in Personnel Preparation and Administration of Programs for Persons with Severe Handicaps, Professor at San Diego State University;

Linda Kay Elliot, Para-professional involved in implementing the Student's program for the District;

Sharon Johnson, Resources Coordinator for Special Education for the District;

The Student's Mother;

Larry Orblom, Assistant Principal at Arapahoe High School;

Jean Ellen Selders, Ph.D. School Psychology, the District's school psychologist;

Janice Gurney, Speech/Language Pathologist for the District;

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James Edward Martin, Ph.D. in Special Education - Transition, Applied Behavior Analysis, Vocational Training, Community and School Integration, Coordinator of the Special Education Program at the University of Colorado at Colorado Springs;

Cheri Camozzi, Teacher of the severely handicapped at Smoky Hill High School, Cherry Creek School District;

Pat Osbon, PACE teacher for the Student for the school years 1987-88 and 1988-89; and

Marchelle Plucknett, Vocational Support Services Coordinator for the District.

C. EXHIBITS

Exhibits in the records include: Joint Exhibits 1 through 200, and Joint Exhibits 202, 203, 204, 206, 207, and 208 (These exhibits were jointly endorsed and authenticated by both Parties, and admitted upon direct reference in the course of witnesses' testimony); Parents' exhibits A, B, C, G, H, I, L, P, R, W, X, CC, JJ, KK, and WW; and the District's exhibits R - 9, 10, 11, 16, 18, 19, 20, 21, 28, 30, 31, 34, 36, 39, 40, 41, and 42.

D. SIGNIFICANT PROCEDURAL AND EVIDENTIARY RULINGS

1. Pre-Hearing Determinations:

The Pre-Hearing Conference was scheduled to be held May 8, 1990 at 9:00 a.m. At that conference, it was confirmed that the Hearing would commence May 9, 1990 at 1:00 p.m. and was anticipated to continue through May 18, 1990, including a Saturday session, on May 12, 1990.

a. Motion to Compel. In response to the Parents' "Motion to Compel the Delivery of School Records and Request for Waiver of Five-Day Exclusionary Rule", the District filed its Reply, oral argument was heard by both Parties on May 8, 1990, and the following decision was rendered:

1. May 3, 1990, Parents made the above-referenced Motion regarding the District's failure to produce copies of certain "education records", which were specified as:

   a. Formalized tests used in formal assessments or evaluations;
   b. Notes taken by school staff members regarding formal assessments and evaluations;
   c. Notes taken by individual staff members during case conferences;
   d. Formalized lesson plans or documented strategies for the Petitioner's program;
   e. Communication devices used in Petitioner's program

such as communication books for school years 1987-88, 1988-89, and 1989-90; and
f. Cooking recipe book or cards used in the 1989-90 Domestic Program.

2. May 8, 1990, at the Pre-Hearing Conference, the District filed their Reply to that Motion, and claimed general timely and lawful compliance with Parents' requests, and responded specifically regarding the allegedly omitted documents:

a. Standardized test protocols (the Hearing Officer presumes that the District does not otherwise object to producing "formalized tests" as requested) are not releasable nor discoverable due to: copyright laws; and public policy concerns for protecting test validity (referenced C.R.S. 1973 Sec. 24-72-204 (3)(a)(iv));

b. Notes taken by school staff members regarding formal assessments and evaluations, and notes taken by individual staff members during case conferences do not fall within the "State Plan" (Part II, VIII, C.2.a.) definition of "education records" and therefore are not discoverable under the EHA;

c. The only "lesson plans or documented strategies for the Petitioners' program" would be those kept by individual teachers and would similarly not fall within the definition of "education records"; and

d. "Communication devices" or "cooking recipe book or cards" known to the District have been delivered to the Parents or the Student.

3. Thus, three general issues are presented for determination:

a. Are standardized test protocols "education records" under the EHA and accessible as other "education records"?;

b. Are notes taken by school staff members regarding formal assessments, evaluations and case conferences, and lesson plans or strategies kept by individual teachers or staff "education records" and accessible as other "education records"?; and

c. Does the Districts' alleged failure to provide access or copies to such requested documentation constitute a denial of the procedural safeguards under the EHA, and denial of a free appropriate public education?

The EHA provides, in pertinent part:

> The term 'free appropriate public education' means special education and related services which . . .

> meet the standards of the State educational agency . . . (20 USC 1402(18))
>
> * * *
>
> (a) Any State educational agency . . . shall establish and maintain procedures in accordance with subsection (b) through subsection 9e) of this section . . .
> (b)(1) The procedures required by this section shall include, but shall not be limited to -
> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to such child (20 USC 1415)

The Fed. Regs. promulgated under the EHA provide, in regards to these issues further guidance:

> State and local educational agencies shall insure, at a minimum, that:
> (a) Tests and other evaluation materials:
> (1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;
> (3) Are administered by trained personnel in conformance with the instructions provided by their producer;
> (b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;
> (c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills . . . (34 CFR 300.532)
>
> * * *
>
> "Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974) (34 CFR 300.560)
>
> (a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identifica-

> tion, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.
> (b) The right to inspect and review education records under this section includes:
> (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records. (34 CFR 300.562)

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides:

> (A) . . . the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which -
> (i) contain information directly related to a student; and
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.
> (B) The term "education records" does not include -
> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the make thereof and which are not accessible or revealed to any other person except a substitute
> (20 USC 1232)

The State Plan provides the following:

> The parties to a hearing ... shall be given written notice at least ten (10)days prior to the date of the hearing:
>
> * * *
>
> (4) That they may review and request copies, at their own expense, of all school records concerning the subject child at any time prior to the hearing. (State Plan, Part II, VII. B. 2. b.)
>
> * * *
>
> Each educational agency or institution shall:
> (1) Permit parents, guardians, or their authorized designees to inspect and review any educational records relating to their child which are collected, maintained, or used by the administrative unit.
>
> The agency shall comply with a request without unnecessary delay and before any meeting regarding an individual education program, or hearing related to the identification, re-evaluation, or placement of the child, and in no case more than three (3) working days after the request has been made, as stipulated in Section 24-72-203(3) CRS (1982 and 1987 Supp.),

and at least ten (10) days prior to any hearing relative to the child. . . .
(3) Provide copies of the records containing the information upon request of the parents, . . . (State Plan, Part II, VIII B.2.a.)

Decision on Motion to Compel

A. Standardized test protocols are "education records" and are accessible by the Parents to the same extent as any "education records" under the EHA. Neither binding nor persuasive authority has been offered by the District to contradict the clear language of the EHA, its regulations and the State Plan pertaining to rights of access to any education records. Colorado's Public Records Act, cited by the District, provides for exceptions from its provisions by the clause ". . . unless otherwise provided by law . . ." (C.R.S. 1973 Sec. 24-72-204 (2)(a) & (3)). The EHA does provide otherwise when relevant information is sought pursuant to review of identification, evaluation and placement of a child and provision of a free appropriate public education.

B. Parents may review and request copies of all school records, i.e. all education records, concerning their child, at anytime prior to the hearing. Records must be provided without unnecessary delay and before any meeting regarding an IEP. While the District may have encountered necessary delay in providing certain observational data to the Parents, delay in the provision of copies of other documents, including test protocols, is not so excused.

C. Notes taken by staff members "which are in the possession of the maker thereof and which are not accessible or revealed to any other person except a substitute" are not "education records" accessible through the District.

D. Whether or not the District's failure to provide certain documents, in a more timely manner or at all, constitutes denial of procedural safeguards and denial of a free appropriate public education shall be deferred for a review of the totality of the circumstances.

E. The District shall provide to the Parents, immediately, copies of all test results, summaries, and protocols for standardized tests and evaluations utilized in the assessment of the Student for the school years 1987-88 through 1989-90, together with any: formalized lesson plans or documented strategies for the Student's program; communication devices; and cooking recipe books or cards, presently in the District's possession or control and not previously provided.

b. Motion in Limine. In the course of the Pre-hearing conference, the Parents made an oral motion for exclusion of evidence pertaining to events and efforts of the District which have occurred after the filing of their Request for Due Process Hearing. The basis of that Motion was that Parents' claims pertain to the violations of the EHA which pre-date the Request for hearing. Decision upon that Motion was deferred until specific evidence would be offered. Generally, upon offer of such evidence throughout the hearing, the Parents objected to the relevancy of such information, and the Hearing Officer overruled the objection allowing evidence of events post-dating April 13, 1990.

c. District's Expert Witnesses. In the course of testimony from the District's witness and psychologist, Dr. Jean Selders, the Parents objected to her opinion testimony, as she was not endorsed as an "expert witness" in the District's Pre-Hearing Statement. In fact, Dr. Selders was listed only as a "Fact Witness" and not as an "Expert Witness" in the District's "List of Witnesses".

The Notice of Pre-Hearing Procedure served upon the Parties, April 27, 1990, required the Parties to submit Pre-Hearing Statements which must contain:

> "Experts. Name, address and brief summary of the qualifications of any expert witness the party filing the statement may call at trial, together with a statement as to each such expert which sets forth the substance of the opinions to which the expert is expected to testify."

The Hearing Officer, generally, ruled consistently with that Pre-Hearing Procedure by sustaining objections to opinion testimony from witnesses not endorsed as experts. District witnesses were allowed to give opinion testimony pertinent to procedural and administrative matters within the purview of the witness' office.

Further, on May 15, 1990, the Parents objected to the offering of testimony from two "expert witnesses" of the District (Martin and Camozzi), as the District's Pre-Hearing Statement did not include any information regarding the substance of their opinions. The Hearing Officer ruled that the expert testimony of those witnesses would not be excluded, so long as the Parents were afforded a good faith opportunity to review testimony with those witnesses prior to them being called. Testimony of those witnesses was anticipated on May 17, 1990, allowing the Parties a short period of time for that good faith review. No further objection was made to their testimony and those two witnesses testified as experts.

III. SUMMARY OF CLAIMS

A. THE PARENTS'

The Parents' Pre-hearing Statement contained the following claims:

1. The District has failed to develop, design or implement

an Individualized Education Program ("IEP") for the Student which is reasonably calculated to enable the Student to receive reasonable educational benefit for the school years beginning 1987-88, 1988-89, and 1989-90, in that educational progress, if any, is so trivial since the beginning of the 1987-88 school year that it does not evidence that the Student has received meaningful educational benefit from her educational programming.

2. The District has failed to develop and design an IEP for the Student, in compliance with Fed. Regs. Sec. 300.346 for the school years 1987-88, 1988-89, and 1989-90, in that it has consistently failed to set forth a statement of the child's present levels of educational performance and has consistently failed to set forth appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved in the Student's IEP. Failure to develop and design an IEP in accordance with Fed. Regs. Sec. 300.346 is a violation of the Student's right to a Free, appropriate public education.

3. The District has refused, or otherwise failed, to permit the parents of the Student to participate in the development of the Student's IEP, in that from the years beginning with the 1987-88 school year to the present, the District has failed to identify present levels of educational performance on the Student's annual IEPs for the years 1987-88, 1988-89, and 1989-90, has refused or otherwise failed to provide present levels of educational performance of the Student and such other information to the Student's parents and legal guardians necessary to enable them to have any meaningful participation in the design of annual goals and short-term instructional objectives or meaningful participation in her IEP.

On May 14, 1990, in the course of the due process hearing, the Parents made an oral motion, based upon the evidence, to amend and add a fourth claim. That motion was granted. The fourth claim was stated substantially as follows:

4. The District has violated the Parents' Procedural Safeguards by failing to provide the notices required by Fed. Regs. Sec. 300.504 & 505 pertaining to the school year 1989-90 short-term objectives put into effect without input from nor notice to the Parents.

B. THE DISTRICT'S

The District's Pre-Hearing Statement provided for the following defense:

The District defends on the basis that each and every element of the Student's IEP is being implemented and that no changes

> to her placement or program are necessary to implement the IEP or provide the Student a free appropriate public education. Further, the District asserts that the Impartial Hearing Officer is without authority to award compensatory education under Colorado law.

IV. FREE APPROPRIATE PUBLIC EDUCATION - EHA

A. THE EHA

In 1975, by Public Law 94-142, Congress enacted the Education of All Handicapped Children Act of 1975, by which state educational agencies would receive federal assistance for the education of handicapped children, so long as the recipients complied with its provisions. The law ensures that certain children, who because of certain handicapping conditions would not otherwise receive beneficial education programming in public schools, would receive a free, appropriate, public education.

> The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services. (20 USC 1401 (a)(1))

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a)(5) of this title. (20 USC 1401 (a)(18))

While the evolution of implementation of this law may have varied from state to state, the U.S. Supreme Court has outlined some guiding principles in the landmark case Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), commonly referred to as "the Rowley case". In that action, the Court emphasized that, under the EHA, a child must be permitted to receive educational benefit from programming to be considered appropriate. Further, upon reviewing an educational program, a trier of fact must determine first whether or not the agency complied with the statutory procedures mandated by the EHA, and then determine whether the IEP developed through those procedures was reasonably calculated to enable the child to receive meaningful educational benefits.

> According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specifically designed to meet the unique needs of

> the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Rowley, at p. 188-9
>
> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Rowley, at p. 192
>
> We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. Rowley, at p. 201
>
> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Rowley, at p. 202
>
> Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Rowley, at p. 203
>
> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., [Sections] 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. Rowley, at p. 205
>
> Therefore, a court's inquiry in suits brought under [section] 1415(e)(2) is two fold. First, has the State complied with the procedures as set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? Rowley, at p. 206-7

Rowley involved the educational program of a hearing impaired child who, despite her hearing impairment, was advancing from grade to grade without the additional services of an in-class interpreter. Distinguished from that factual situation was Polk v. Central Susquehanna Intermediate, 1988-89 EHLR DEC. 441:130 (3rd Cir. Court of Appeals, 1988) which involved a fourteen-year-old boy with physical and mental capacities of a toddler seeking direct physical therapy services. In that action, the Court commented upon the degree of educational benefits mandated by the EHA, as follows:

> Unlike the services of a full-time interpreter (which arguably may be deemed extraordinary assistance), physical therapy, . . . is an integral part of what Congress intended by "appropriate education" as defined in EHA, and it is an essential part of Christopher's education.
>
> Finally, because of the severity of Christopher's disabilities and their qualitative difference from those of Amy Rowley, it is difficult to apply Rowley here. Christopher's progress cannot be measured by advancement in grade or acquisition of academic skill. His needs are drastically different, but no less important. . . . Indeed, the needs of children like Christopher were paramount in the eyes of the EHA sponsors. The EHA provides that the most severely handicapped children be served first. See 20 U.S.C. [Section] 1412(3). Polk, at p. 143 EHLR

Like Christopher Polk, educational benefit for the Student in this action cannot be measured by advancement in grade or acquisition of academic skill. But, like generally agreed by the District and Parents, must be measured in terms of acquisition of basic life skills and independence. The District cites Rettig v. Kent City School District, 3 EHLR 552:503 (D.C. N Dist. of Ohio, 1981) regarding the test of "appropriate" benefits for this severely handicapped Student. The Hearing Officer finds its language meaningful to this case where it is stated:

> . . . an "appropriate" education for a child as severely handicapped as Thomas Rettig is one that gives him a reasonable chance to acquire the skills he needs to function outside of an institution. Rettig, at p. 507 EHLR

Also cited by the District was Armstrong v. Kline, July 13, 1979 EHLR 551:195 (E.Dist. Pa., 1979) affirmed Battle v. Commonwealth of Pennsylvania, 3 EHLR 551f:647 (3rd Cir. Court of Appeals, 1980) regarding a class of severely and profoundly impaired children seeking extended school year instruction and In Re: Sparta Area Board of Education, 1984-85 EHLR. Dec. 506:248 (State Superintendent of Education, Wisconsin, Jan. 13, 1984), also involving children profoundly and severely impaired by mental retardation. Those children's educational needs were not significantly unlike the needs of this Student, i.e. self-sufficiency.

> . . . Congress recognized attaining self-sufficiency as a goal of an appropriate education for handicapped children and sought to secure it by enacting the Education for All Handicapped Children Act. The Court concludes, therefore, that the unique needs that must be met by the educational program include those that, if satisfied, allow the child, within the limits of his or her handicap, to become self-sufficient. Armstrong, at p. 209 EHLR

Based on the rationale of the decision in Armstrong v. Kline, *supra*, I am of the opinion that for children profoundly and severely impaired by reason of mental retardation the "basic floor of opportunity" required by the EHA consists of educational programming reasonably calculated to permit the child, within the limits of his or her handicap, to become self-sufficient. *In re Sparta*, at p. 251 EHLR

B. DOCUMENTATION & PARENT PARTICIPATION

As emphasized by *Rowley*, procedural compliance is the first test in determining whether or not the District's efforts have provided a free, appropriate, public education. Significant parts of procedure are documentation and parent participation, as seen in the following recitation of statute, regulations, and the State Plan.

1. *The EHA*:

> The term "free appropriate public education" means special education and related services which . . . (B) meet the standards of the State educational agency, . . . 20 USC 1401(18)
>
> * * *
>
> The term "individualized education program" means a *written statement* for each handicapped child *developed in any meeting by a representative of the local educational agency* . . . who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, *the teacher, the parents or guardian of such child*, and, whenever appropriate, such child, which statement shall include (A) a statement of *the present levels of educational performance of such child*, (B) a statement of *annual goals*, *including short-term instructional objectives*, (C) a statement of the *specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs*, (D) *the projected date for initiation and anticipated duration of such services*, and (E) *appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved*. 20 USC 1401 (19)
>
> * * *
>
> Any State educational agency . . . which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.
>
> (b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to-

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records . . .

* * *

(C) written prior notice to the parents or guardian of the child whenever such agency or unit-

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child; 20 USC 1415 (a) & (b) Fed. Regs. 300.504 identical to Statute

2. The Federal Regulations:

Definition.
As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with [sections] 300.341-300.349. Fed. Regs. 300.340

When individualized education programs must be in effect.
(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.
(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under [section] 300.343. Fed. Regs 300.342

Meetings.
(a) General. Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

* * *

(d) Review. Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year. Fed. Regs. 300.343

Participants in meetings.
(a) General. The public agency shall insure that each meeting includes the following participants:

* * *

(3) One or both of the child's parents, subject to [section] 300.345. Fed. Regs. 300.344

Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend

* * *

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

* * *

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting . . .

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

Fed. Regs. 300.345

* * *

General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of [sections] 300.500 -300.514 Fed. Regs. 300.501

Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in [sections] 300.562 -300.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

Content of notice.

(a) The notice under [section] 300.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those

options were rejected:

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal. Fed. Regs. 300.505

3. State Regulations:

Functions of the Staffing Committee. The functions of the staffing committee, individually and collectively, shall be to:

(6) Develop or assure the development within twenty school days of:

(a) Short-term instructional objectives based upon the established goals.

(b) Evaluation criteria.

(7) Keep accurate records of all the proceedings.

(8) Utilize the proceedings for the development of the individual educational program. State Regs. 3.05

Development of the Individualized Educational Program (IEP).

(1) The individual educational program may be developed during the staffing meeting described in 3.04 of these Rules, or it may be developed at a separate meeting conducted at another time, but within twenty school days of the determination that a child is handicapped.

(a) Whether conducted as a part of the staffing or at a separate meeting, parents shall be notified, in writing, in a timely manner, of the purpose, time, and location of the conference and who will attend. They shall be encouraged to attend and participate in the conference.

* * *

(2) At a minimum, except as indicated in 3.07 (3), the IEP shall be developed by:

* * *

(d) The parent.

* * *

(3) Should the parent elect not to attend and participate in the IEP conference, documentation of the administrative unit's attempts to arrange the meeting must be kept, and a copy of the completed IEP sent to the parent. State Regs. 3.06

Parental Involvement. Prior to placement of a child in a special education program:

* * *

(2) Written permission for placement of the child shall be obtained from the parents. If permission is refused, the local board of education may take appropriate action. State Regs. 4.01

Review Procedures. Administrative units shall define procedures for conducting special, annual and termination staffings. Such procedures shall provide that:
(1) Parents be notified in a timely manner of the committee meeting and be given the opportunity to attend.
(2) Parents be informed that if they disagree with the results of the annual review, they may initiate appeal procedures as required in these Rules.
(3) A report of the review be prepared and kept in the student's records and a copy mailed, or personally delivered, to the parents. State Regs. 5.03

4. State Plan:

Staffing/Development of the IEP

* * *

2. Procedures
Each administrative unit shall include in its local comprehensive plan the manner in which the unit intends to comply with this policy. At a minimum, however, the unit shall:
a. Require that the composition of the staffing/IEP committee adhere to the Colorado Rules, 1 CCR-301-8 Rule 2220-R-3.04, 3.05 and 3.06 and Federal Regulations 34 CFR 300.334-300.349.
b. Require that the staffing/IEP committee reach its decisions by consensus.
c. Permit committee members to communicate with each other regarding the assessment of the child prior to the staffing.
Committee members shall communicate in this matter solely for the purpose of acquiring sufficient knowledge with which to make a well-informed decision at the staffing in the best interest of the child.

* * *

f. Adhere to the following functions of the staffing/IEP committee: 1 CCR 301-8-Rule 2220-3.04, 3.05, 3.06 and Federal Rule 34 CFR 300.346.

* * *

(2) Determine the present levels of functioning.

* * *

(5) Prioritize and cluster identified needs into annual measurable goals.
(6) Identify the characteristics of services which will meet the child's identified needs/goals.

* * *

(9) Keep accurate records of all proceedings.
(10) Identify the specific special education and related services to be provided to the child and the extent to which the child will be able to participate in regular educational programs . . .
(11) Establish the dates for initiation of services and the anticipated duration of the services.

(12) Identify the objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.
State Plan, Pt. II, V. E.

* * *

Definitions - Location, Evaluation and Identification of Handicapped Children

* * *

5. "Consensus" means the collective opinion and general agreement, after discussion, which should infer commitment to the decision reached. State Plan, Part II, V. F.

* * *

Procedures

4. Procedures required prior to placement in a special education program shall include:

* * *

c. Written parental consent shall be obtained.

* * *

5. Review staffings:

* * *

Written prior notice regarding review staffings must be given in a timely manner so as to give the parent an opportunity to attend and participate and must include: State Plan, Part II, VI, B.

III. FACTUAL FINDINGS

This Hearing Officer makes the following finding of fact:

A. THE STUDENT

The Student is an eighteen year old girl who, from birth, has been challenged by mental retardation and severe communication impairments. According to the May 1985 "IEP - ASSESSED ABILITIES AND CURRENT FUNCTIONING", the following information was provided regarding the Student, based upon March 1985 testing:

"Intelligence - Leiter, IQ = 45, MA = 5 - 3; "K-ABC, C.A. = 13-5; M.A. = 5 yrs 4 mos; MPC = 51 (IQ), Sequentials - 50, Simultaneous = 55, and Non-verbal IQ = 53;

"Cognitive Strengths - recognizes associations on basis of practical use. i.e. vacuum to carpet. Confident of own ability to do a task."

"Cognitive Weaknesses - self-evaluation of completed tasks - abstract concept development"

"Perceptual Strengths - visual discrimination - matching"

"Perceptual Weaknesses - motor planning - visual motor integration - auditory discrimination - auditory memory - sensory motor integration"

"Performances/Study Skills/Behavior at School - Attention span is functionally adequate for all tasks. Her willingness to participate greatly interferes with on task behavior. Behavior interferes with on task performance frequently. Able to control behaviors but has had difficulty with this in the new situations of Junior High School. See Part D's and Form J's from 84'/85' school year" [this referenced documentation is not in evidence].

"Achievement Levels - G.E. Reading & Math - [The Student] matches letters and can match first letter of a word to that letter for alphabetizing, [the Student] does not have any sound/symbol association. She consistently recognizes her first name and usually recognizes her street name. [The Student] has 1:1 correspondence when she can manipulate the objects. She can usually match numbers. Counts rote to 8. has numeral comprehension 1,2, and 4 when visually presented. Has some concept of quantity of numbers. Has difficulty matching a sunl [sic?] symbol to auditory symbol. Aphasia affects performance on these tasks. Can recognize some numbers when self initiated (i.e. 0, 1, 2, & 4).

"Oral Communication Skills - [The Student] combines speech and signs to communicate. Apraxia and word finding difficulties (which cross both expressive modalities) reduce her effectiveness. The familiar listener can understand [the Student] if the topic is known. Answers to yes/no questions. May not always be valid, especially when complex sentence structures are used or high emotionality is involved. (Cont.) [there was no further information provided following what seems be an abbreviation of the word "continued"]

"Written Communication Skills - [The Student's] fine motor skills are functional for all routine domestic and vocational skills. She demonstrates some difficulty with gradation of pressure and strength; and with rapidly alternating movements. She has no functional writing/pencil skills. [The Student] can print her name when letters are dictated.

"Interests/Pre-Voc. - Vocational Activities - VOC - [The Student} locates VOC classroom & in-school job exper. site, time card, & materials. Refusal to begin or continue work is problem approx. 25% of time. Unaware of need to check appearance before work (needs prompts). Requires frequent approval &/or prompts from supervisor to continue work. Work related communication is limited primarily to gestures. Limited productivity when part of group effort due to poor interaction skills with school peers. Interests - enjoys [unreadable] Sub. Activities, baseball, basketball, swimming, bike riding, interactive games, 4-H, cooking, bowling.

> "Health/Physical Status/Motor Deficits/Medication - Delayed gross and fine motor patterns. Functional but abnormal gait pattern. Poor rotational patterns in all movements; poor wt-shifting; Primitive reflexes are not fully integrated. Sensory integration is significantly delayed. [The Student] compensates for many of her physical problems and has gross motor skills above expectations.
>
> "Emotional Status/Self-Feelings - At most times, [the Student] seems happy with herself and others. She becomes frustrated when she cannot express her wants and when others do not understand her wants. [The Student] frequently has difficulty functioning in groups when she is not the center of attention (at school). No self monitoring of loudness in social situations. Imitates others negative behaviors.
>
> "Social Skills - Enjoys being with other people. Very social with significant peers and adults. Enjoys playful teasing with specific adults. Does not enjoy sharing with others. Frequently hits or pinches peers. In the classroom rarely initiates peer interaction. Can be non compliant with any authority figure by not responding, saying no or looking angry. Enjoys social situations. Social judgement interferes with her being effective in poor [not readable].
>
> "Self-Care/Hygiene/Adaptive Skills/Travel - Travel- Rides RTD to school in AM with [unreadable] shadowing. Rides RTD to comm. job w/ supervision. Frequently [the Student] stares & smiles at strangers & seems unaware of where/when to get off for job. In highly familiar neighborhoods, has good directional awareness and orientation. Hygiene - dependent in menstral care; has steps of self grooming skills but has difficulty with goal of the task. Dressing - independent except for bra. Street Safety - has very functional street safety skills.

Further, detailed information was provided regarding the Student's communication deficits in the Augmentative Communication Evaluation dated June 4, 1986, by Tracy Kovach, Augmentative Communication Specialist:

> [The Student] is a girl who is multiply handicapped (significantly limited intellectual capacity and physically handicapped). She is verbal however due to aphasia and apraxia her speech intelligibility is poor unless the context is known. She has a large sign vocabulary which she uses to augment her speech. Her sign language not only helps a familiar listener understand but it also improves her speech production. [The Student] also has several communication books with pictorial representations of places, people, belongings, feeling words, etc. She has other communication books that relate to her daily routine and/or are specific to community experience.
>
> I observed [the Student] using her communication books. She

knows what the pictures represent but has difficulty finding them in her books. [The Student] appears to use her communication books in response to questions. She does not use them spontaneously to communicate needs or desires. Her preferred method to initiate conversation is speech. If she is able to communicate the context of her conversation she can often be understood by familiar people. She does however use her communication book in the community when going to a restaurant. She knows that she has to use the pictures to indicate her preferences (food order) because "others" do not understand her speech and/or sign language. The use of pictures to sequence her daily routine is very helpful and gives her the structure she needs to anticipate activities. No electronic communication devices were available at this time to try with [the Student].

Aphasia and apraxia were discussed by Janice Gurney, Speech/Language Pathologist, in the course of the hearing, and described as follows: aphasia is a receptive/expressive language processing disorder, such that the Student has difficulty adequately connecting/associating words with thoughts and thus has difficulty hearing and speaking; apraxia is a disorder associated with lack of control of the muscles which control speech.

With regard to the Student's behavior, an August 1985 profile prepared by her Mother provides further information (and she made specific suggestions regarding responses to specific behaviors):

1. [The Student] has (residual) tactile defensiveness - she does not like to be touched.

* * *

2. [The Student] will test new situations and people and will get into a power struggle if the situation presents itself.

* * *

3. [The Student] needs direction - she needs to be told, not asked, what to do.

* * *

4. [The Student] may not process immediately - she needs time to think about it.

* * *

5. [The Student] needs time to prepare - she performs better if she knows what will happen next so she can get set for it. - she also performs better if she knows what is expected of her ahead of time.

* * *

6. [The Student] has an initial "no" response that may have many meanings:

"I did not process"
"I don't understand"
"I don't feel comfortable"
"I am not sure"
"I don't want to"
"I don't know"
"Let me think for a minute
"I refuse"

> "I don't agree" "I can't express myself"
>
> * * *
>
> 7. [The Student] likes to refuse to participate - she will come back to task generally if given time to change her mind.
>
> * * *
>
> 8. [The Student] does not like to share most times.
>
> * * *
>
> 9. [The Student's] greatest attribute is her independence and, whenever possible, she should be allowed to use it.
>
> * * *
>
> 10. [The Student] is very likeable and generally wants to please people - she will say she is sorry and will return to the situation with a smile if given the opportunity.

While this Student was significantly challenged by mental retardation, significant communication difficulty and behavior problems which required those around her to have a definite plan, she also had some strengths, pre-dating the commencement of the 1987-88 school year. Foremost was a girl perceived generally as being active, out-going, social, and interested in being productive and valued.

Of equal importance were the Student's parents who were advocating fervently for their daughter, with high hopes and dreams, and with uncommon knowledge and resourcefulness. The Father has a reputation has a competent attorney whose practice has involved him in advocating for other parents of handicapped children, and who has lived up to that reputation through the quality of preparation and presentation of his daughter's case. The Mother has held the position of Executive Director of the Arapahoe County chapter of the Association of Retarded Citizens, and, through her testimony and certain exhibits in the file, has demonstrated herself to be articulate and knowledgeable especially regarding her daughter. These Parents have shown an intense interest in their daughter and the programming for her at the District, from their first contact in 1981 until the present.

B. DOCUMENTATION OF ACTIONS TAKEN PER EHA

1. Pre - 1987-88 School Years:

Prior to 1981, the Student had been involved in special programming from pre-school (at Ohio State University), to special and regular programming from kindergarten and after, in public schools. With her family, the Student moved to Littleton in 1981, and has been identified as educationally handicapped in this District ever since.

The most significant documentary evidence of IEPs previous to the 1987-88 school year was Joint Exhibit 185 ("J185", hereafter setting the pattern for references to exhibits), which is a three page document developed in the course of the May 1985 "Triennial" staffing, and as a result of a comprehensive assessment. That document purportedly represents the consensus of the District staffing committee regarding: assessed abilities and current functioning; needs assessment; and service plan, as of May 1985.

Also in evidence were IEP Implementation Plans (commonly referred to as "Part D's" throughout the hearing and in this Decision), each of which represented the IEP for a goal and short-term objectives for attainment of that goal. There were numerous Part D's in evidence for school years prior to 1987-88.

2. 1987-88 School Year:

The District record contains a document (J155) dated April 29, 1987, titled "Annual Review" and which further states: "Tuesday, May 5, 1987 2:30-4:00 p.m. Heritage H.S. Conference Room". This document goes on to describe "Staff attending" and "Agenda". There is no evidence that this document represents notice of a meeting, or otherwise how it was used by the District.

The District record contains a series of documents which pertain to the 1987-88 school year's IEP, its development, modification, and review, (referenced by Exhibit No.'s) as follows:

*J133 - Part D - 87-88 - Domestic goal and objectives -signed by P. Osbon
*J139 - Part D - 87-88 - Behavior goal and objectives - signed by J. Selders.
*J162 & J161 - Summary of Case Conference - 4-23-87 - re: travel to & from work - signed by Mother & W. Kaspzyk, PACE teacher.
*J141 - Part D - 4/87 - Life Mgmnt-Self-directed objectives -signed by J. Selders.
*J142 - Part D - 5/87 - Affective Behav. goal and objectives - signed by J. Selders.
*J149 - Part D - 5/87 - Extended school year goal & objectives - unsigned.
*J148 - Summary of Case Conference - 6/1/87 - signed only by "S. Johnson", pertains to an upcoming meeting to finalize the "ESY schedule".
*J153 - Part D - 6/10/87 - Community (shopping) goal & objectives - unsigned.
*J151 - Part D - 6/10/87 - Domestic (ESY) goal & objectives - unsigned.
*J150 - Part D - 6/12/87 - Domestic (ESY) goal & objectives - unsigned.
*J152 - Part D - 6/12/87 - Community (RTD shopping) goal & objectives - unsigned.
*J147 - Summary of Case Conference - 9/5/87 - signed by the Mother and Pat Osbon, teacher, pertains to the Student being accompanied in the community by a peer tutor.
*J146 - Summary of Case Conference - 9/24/87 - signed by the Mother and Pat Osbon - pertains to a variety of practical logistics in the Student's program.
*J144 - Summary of Case Conference - 11/25/87 - signed by the Father and other District Staff, pertains to finalizing goals

and objectives.
*J67 - Part D - 12/1/87 - Community Goal & objectives - (restaurants) - signed by P. Osbon.
*J112 - Part D - 12/1/87 - Community Goal & objectives (RTD for shopping) - signed by P. Osbon.
*J118 - Part D - 12/1/87 - Community Goal & objectives (shopping) - signed by P. Osbon.
*J120 - Part D - 12/1/87 - Community Goal & objective (banking) - signed by P. Osbon.
*J122 - Part D - 12/1/87 - Social interaction goal & objectives - signed by P. Osbon.
*J135 - Part D - 12/1/87 - Community Services goal & objectives - signed by P. Osbon.
*J119 - Part D - 12/7/87 - Community goal & objective (RTD to work) - signed by M. Plucknett.
*J98 - Part D - 12/7/87 - Vocational goal & objectives - unsigned.
*J143 - Summary of Case Conference - 12/11/87 - signed by the Mother and Pat Osbon - pertained to class scheduling for 2nd semester.
*J96 - Summary of Case Conference - 2/3/88 - signed by the Parents and Pat Osbon - pertained to schedule review.

3. 1988-89 School Year:

The District record contains a series of documents which pertain to the 1988-89 school year's IEP, its development, modification, and review, (referenced by Exhibit No.'s) as follows:

*J95 - Summary of Case Conference - 3/17/88 - signed by various staff members - pertained to assessment for Triennial.
*J55 - Parent/Family Inventory of Priority Goals - 3/23/88 - unsigned.
*J54 - Team Report - 5/12/88 - unsigned - provides information pertaining to present levels of functioning.
*J50 - IEP - End of Year Status - 5/19/88 - unsigned.
*J59 - Part D - RTD goal & objectives - 5/88 - unsigned.
*J63 - Part D - Leisure/Rec. activities at South Suburban goal & objectives -5/88 - unsigned.
*J65 - Part D - Leisure/Rec. activities at home & school goal & objectives - 5/88 - unsigned.
*J66 - Part D - After school activities goal & objectives - 5/88 - unsigned.
*J78 - Part D - Emergency procedures goal & objectives - 5/88 - unsigned.
*J79 - Part D - Community Jobsite goal & objectives - 5/88 - signed by M. Plucknett.
*J93 - Part D - Speech/Language goal & objectives - 5/88 - unsigned.
*J94 - Part D - Summer school 1988 goal & objectives - 5/88 - unsigned.
*J207 - Part D - Transition Plan goal & objectives - 5/88 - unsigned.
*P-A (Parent's Exh. A) - Letter to R. Booth - 12/9/88 - per-

taining to lack of progress in Student's IEP.
*J57 - Summary of Case Conference - 12/13/88 - signed by P. Osbon & M. Plucknett - pertained to independent bus ride for Student, w/o shadowing.
*J56 - Summary of Case Conference - 12/15/88 - signed by P. Osbon & M. Plucknett - pertained to Student having been lost on bus.
*J88 - Summary of Case Conference - 1/24/89 - signed by Parents, various Staff, & CDE consultant, J. Filbin - pertained to consultation with CDE specialist.
*J89 - Summary of Case Conference - 3/14/89 - signed by Mother & various Staff - pertained to J. Filbin's report & recommendations.
*J92 - Part D - 5/89 - Community goal and objectives (summer 1989) - unsigned.

4. 1989-90 School Year:

The District record contains a series of documents which pertain to the 1989-90 school year's IEP, its development, modification, and review, (referenced by Exhibit No.'s) as follows:

*J46 - Notice of Individual Educational Program Annual Review - 4/10/89 - signed by P. Osbon - giving notice of Annual Review to be held 4/27/89, its attendees, its functions, parents rights and invitation of parents to the meeting.
*J47 - Annual Measurable Goals - 5/89 - unsigned.
*J5 - Part D - RTD goal & objectives - 5/89 - unsigned.
*J44 - Part D - Extended school year goal & objectives - 5/89 - unsigned.
*J11 - Part D - Vocational Domain goal & objectives - 5/89 -signed by M. Plucknett.
*J10 - Part D - Speech/Language goal & objectives - 6/89 -signed by J. Gurney.
*J12 - Summary of Case Conference - 9/7/89 - pertaining to the Student's placement at Littleton Hospital - signed by M. Plucknett.
*J43 - Summary of Case Conference - 9/14/89 - pertaining to scheduled IEP meeting (9/20/89) - signed by M. Plucknett & K. Coffey-Siegel.
*J6 - Summary of Case Conference - 9-20-89 - pertaining to completion of objectives for 1989-90 year - signed by Father & various Staff.
*J41 - Memorandum - 10-4-89 - pertaining to Parents' comments on and Parents' suggestions regarding proposed goals and objectives for 1989-90 year - unsigned but indicates that it was authored by the Parents.
*J42 - Summary of Case Conference - 10/4/89 - pertaining to review of IEP - unsigned.
*J3 - Individual Transition Plan - 1/10/90 - pertaining to transitioning Student into program with other community programs participating - exhibit contains an undated page with signatures of Parents and various Staff and representatives of other community service organizations.

*J2 - Summary of Case Conference - 2/12/90 - pertaining to review of IEP - unsigned.
*J203 - Summary of Case Conference - 2/27/90 - pertaining to delivery of certain documents to the parents - signed by J. Selders.
*J7 - Part D - 89-90 - Emergency goal & objectives - unsigned.
*J24 - Part D - 89-90 - Social goal & objectives - unsigned.
*J26 - Part D - 89-90 - Community goal & objectives - unsigned.
*J33 - Part D - 89-90 - Domestics goal & objectives - unsigned.
*J52 - IEP Assessment/Functioning Summary - "Printed 2/14/89" - unsigned.

C. ANALYSIS OF IEPs DEVELOPMENT & IMPLEMENTATION

At the commencement of this three-year educational period, the Student was seen to have certain identifiable (although not quantified and documented sufficiently) skills and positive attributes. Also recognizable were certain and numerous identifiable (again not well documented) needs, if independence were the goal of the programs. And, independence as the end goal was one issue upon which both Parties agreed, throughout the testimony and documentation. That goal was stated by at least two District witnesses (Coffey-Siegel and Clement), to give the Student the opportunity to be as independent as possible. That goal certainly satisfies the standards set by Polk and Armstrong, supra.

The program by which such independence might be attainable was the subject of dispute between the District and the Parents. Each Party adhering to the view that the programming over the last three years was appropriate (District) or inappropriate (Parents). Certainly a formidable program would have to be devised, one which was intense, tedious for its instructors, and well documented.

It was the combined testimony of Drs. Pumpian and Martin which persuaded this Hearing Officer about the basic type of instructional program which would have to be followed to assist this Student to attain the goal of actual independence. That is a program of "systematic instruction", by which: the specific measurable goals be stated; in order for those goals to be measurable, the Student's beginning level of performance would be quantified and documented ("baseline"); and the Student's progressive levels of performance would also have to be quantified and documented ("present level of performance"); an instructional plan by which the Student will be guided from "baseline" to her goal be devised and used; and there be systematic data-keeping by which and from which the Student's performance levels may be traced from "baseline" to attainment of the goal.

A semblance of such a "systematic instruction" program was attempted by the District during the subject years. At times, the District's effort was well thought out. At times the programming was implemented. At too many times, however, these efforts were either not well planned and/or not implemented at all. The starkest example was the 1989-90 school year, where communication systems devised in previous years were ignored; plans were made (unilaterally) but not implemented; and the Student was guided through the year purportedly learning skills learned in past years, by a para-professional who was without lesson plans and concrete direction from her Team.

In addition to the substantive programming problems experienced during these three years, there were countless procedural defects in the record which presumptively (Rowley) had effect upon the IEP development and implementation. These defects will be addressed roughly in the same order as the law has been outlined above.

1. There was a continuous course of conduct, in violation of the EHA and the State Plan, on the part of the District when staff ignored the Parents' requests for performance data, particularly "baseline" data in connection with developing goals and objectives. This conduct was undoubtedly unintentional, as the District continually demonstrated considerable efforts and expenditure of resources in the programming and implementation for this Student. However, the District's total lack of understanding of the nature of the need for basic data of performance is highlighted by the almost total absence of documentation of such information in the IEPs. It was further highlighted and demonstrated for the Hearing Officer through the extraordinary lack of responsiveness to the Parents' requests for production of the "education records" up to and throughout the Due Process Hearing. The record is replete with evidence that suggests either a dearth of understanding of the problem or strained communication systems within the District's staff, or both. This effectively prevented the Parents from participating in the programming for their child, in a meaningful way.

2. There was only one instance, in the record, of an attempt by the District to give the Parents prior written notice of a meeting. With regard to meetings which the Parents initiated, this is not necessarily a problem. However, whenever one of these meetings resulted in a change in the IEP (new goal, new objective, new venue for services), documentation of notice and opportunity to participate, and advisement of rights, is clearly required.

3. There were many instances in the preparation of both the 1988-89 and 1989-90 IEP's of the District staff preparing Part D's apparently without parental involvement, must less consent to the content of the program. Each time District staff proposed to create new or revised programming for the Student, or whenever they refused to initiate programming requested by the Parents (October 4, 1989 is the best example), they were obliged to involve the Parents, by notice and opportunity to participate, with full advisement of procedural rights. As a matter of law,

communication between committee members for the purpose of developing any part of the IEP, without the opportunity for parents to be involved, should not have occurred.

4. Also pertaining to the 1988-89 and 1989-90 IEP's, those programs were not documented either at the commencement of the school year nor within twenty days of the IEP meeting.

5. The Parents complain that they were not given copies of the 1988-89 IEP's until long after the program had been initiated. The District, contrary to their clear obligation to do so, has no documentation to contradict that claim.

6. The law requires that the District obtain written consent from parents prior to placement in a program. There is no evidence that this has ever been done.

7. To review the District's efforts, the best and most relevant evidence is the series of Part D's which document these efforts during these three school years. These IEP Implementation Plan statements were analyzed by asking the following questions:

a. Was there a statement of present level of functioning ("PLF")?
b. Was there a statement of an annual measurable goal ("AMG")?
c. Were there statements of short-term objectives ("STO")?
d. Was there a statement identifying the services to be provided by the District ("SVC") [There were no attempts to document "the characteristics of services to address the Student's needs, so this was not analyzed further]?
e. Were the dates of service identified ("DT")?
f. Was there a statement of criteria by which performance could be evaluated ("CRI")?
g. Was development of the short-term objectives and evaluation criteria within 20 days of development of the goal, according to the document ("20")?
h. Was parental involvement documented ("P")?
i. Were the goal and objectives developed by consensus of parents and District staff ("C")?
j. Were objectives substantially implemented in accord with the Part D statements ("I")?

The results of this analysis have been charted below, and are the findings of the Hearing Officer with respect to the above-identified criteria. Because this dispute between the District and the Parents revolves around documentation and the requirements for documentation in the EHA and the State Plan, a few of these IEP Implementation Plan statements are fully discussed. (Part D's are referenced first by Exhibit numbers in the record, and the goals are numbered as found by the Hearing Officer, not necessarily corresponding to numbering on the documents)

J133 Part D for "Domestic" goals for the 1987-88 school year, dated 12/3/87.

There is no statement of present level of functioning. This omission runs throughout the District's Part D's, mitigated only where there has at least been an attempt to reference and incorporate information from some other documented source.

There is a statement of an annual measurable goal, and if there was also a statement of present level of functioning with criteria for evaluation, measurement would be possible and very useful.

There are statements of short-term objectives, essentially and reasonably parroting the goal statement.

There are statements identifying the services to be provided for instruction by the District. That is: "paraprofessional to work towards no prompt"; "materials - cleaning materials from [the Student's] home"; "task analysis -teacher observation".

There are no statements of dates of commencement or duration of the implementation of this program.

There are no statements of evaluation criteria. Had the task analysis been prepared and referenced in this document, such criteria might have been found there.

From other evidence, not from this document, it is found that this Part D statement was developed within 20 days of an IEP meeting. Not sufficient documentation.

From that same evidence, it is also found that this Part D statement might have been developed with parental involvement. Not sufficient documentation.

From the evidence as a whole, objectives 1, 2, 6 & 7 were not substantially implemented. There was documentary evidence that objectives 3, 4, & 5 were substantially implemented. Whether or not goal attainment can be measured in a meaningful way is not demonstrated in the documentation.

J135 - IEP Implementation Plan, for the 1987-88 school year, dated 12/1/87:

There is no statement of present level of functioning.

There is a statement of annual measurable goal, provided there would also be a definition of "baseline"

There are statements of short-term objectives.

There are statements of the services to be provided for instruction by the District, that are: "trainer to work towards no prompt at post office"; "communication book"; "task analysis - teacher obs."

There is no statement of dates of service.

There are no evaluation criteria stated.

From other evidence, it is found that this Part D was developed within 20 days of an IEP meeting.

From other evidence, it can be found that there might have been parental involvement, but no documentation.

There is no documented evidence of consensus.

Documents demonstrate partial ("P") implementation of objectives 1, 2, & 4. (See Exhibits J136, J138, & J137) The task analyses are poorly dated, provide little of the type of detailed information of the Student's activities (fair information regarding the instructor's activity), and inexplicably reflect cessation of the instruction activity.

J119 - IEP Implementation Plan for Community Domain, for the school year 1987-88, dated 12/7/87:

There is no statement of present level of functioning.

There is a statement of an annual measurable goal.

There are statements of short-term objectives.

There are statements of services to be provided.

There are no statements of dates of service.

There are no statements of evaluation criteria.

It is found that this Part D was developed with 20 days of an IEP meeting.

There is documentation of parental involvement in the meeting out of which this Part D may have developed, but no documentation of the fact of their involvement in this document.

There is no documentation of consensus.

J113 documents a substantial effort at implementation of this Part D, although imprecisely dated, and providing information mostly about the instructor's activities (i.e. the type of prompts given), rather than the Student's efforts and activities.

Other Part D's - Highlights:

J98 Part D for Vocational Domain. Unable to determine implementation from documents in evidence (J132 may be connected, but without precise dates cannot connect).

J79 Part D for Vocational Domain. Objectives implemented for 2 out of 3 jobs (South Suburban & Sears) but task analysis for the Goodsen Recreation Center was imprecise and inexplicably reflected cessation.

J5 Part D for RTD transportation and pedestrian skills. J20 and 21, data sheets for RTD travel and pedestrian skills, reflect that the Student's skills were the same from start to finish, but there is no indication what those skills were in relation to instructor activity. Don't know whether or not the Student was independent or still in "phase I" instruction, at the time the activity was inexplicably ceased.

J44 is representative of the totally inadequate and inappropriate IEP documents routinely developed for extended school year programming.

CHARTING OF IEP DEVELOPMENT & IMPLEMENTATION

Legend: Y - yes; N - no; P - partially

Exh	G/O	PLF	AMG	STO	SVC	DT	CRI	20	P	C	I
'87-88	SY										
J133	1	N	Y	Y	Y	N	N	Y	N	N	N
	2	N	Y	Y	Y	N	N	Y	N	N	N
	3	N	Y	Y	Y	N	N	Y	N	N	Y
	4	N	Y	Y	Y	N	N	Y	N	N	Y
	5	N	Y	Y	Y	N	N	Y	N	N	Y
	6	N	Y	Y	Y	N	N	Y	N	N	N
	7	N	Y	Y	Y	N	N	Y	N	N	N
J139	1	Y	Y	Y	Y	Y	Y	N	N	N	Y
J141	1	N	N	Y	Y	Y	N	Y	N	N	Y
J142	1	N	Y	Y	Y	N	N	N	N	N	Y
J149	1 - 7	N	N	N	N	N	N	N	N	N	N
J153	1 - 4	N	N	Y	N	N	N	N	N	N	N
J151	1 - 4	N	N	Y	Y	Y	N	N	N	N	N
J150	1 - 7	N	N	Y	Y	Y	N	N	N	N	N

J152	1 - 6	N	N	Y	Y	Y	N	N	N	N	N
J67	1 - 2	N	N	Y	Y	N	N	Y	N	N	Y
J112	1	N	Y	Y	Y	N	Y	Y	N	N	N
J118	1 - 3	N	Y	Y	Y	N	N	Y	N	N	N
J120	1	N	Y	Y	Y	N	N	Y	N	N	N
J122	1 - 2	N	Y	Y	Y	N	Y	Y	N	N	N
J135	1	N	Y	Y	Y	N	N	Y	N	N	P
	2	N	Y	Y	Y	N	N	Y	N	N	P
	3	N	Y	Y	Y	N	N	Y	N	N	N
	4	N	Y	Y	Y	N	N	Y	N	N	P
J119	1 - 2	N	Y	Y	Y	N	N	Y	N	N	Y
J98	1 - 9	N	Y	Y	Y	N	Y	Y	N	N	N
‘88-‘89 SY											
J59	1 - 5	N	Y	Y	N	N	N	N	N	N	N
J63	1 - 2	N	Y	Y	Y	Y	N	N	N	N	N
J65	1 - 2	N	N	Y	N	N	N	N	N	N	N
J66	1 - 3	N	N	Y	Y	N	N	N	N	N	Y
J78	1 - 4	N	N	Y	N	N	N	N	N	N	N
J79	1 - 4	N	Y	Y	Y	N	Y	N	N	N	Y
J93	1 - 7	N	Y	Y	Y	N	Y	N	N	N	N
J94	1 - 4	N	N	Y	N	N	N	N	N	N	N
J207	1	N	Y	Y	Y	N	N	N	N	N	N
J92	1 - 6	N	N	Y	N	N	N	N	N	N	N
‘89-‘90 SY											
J5	1 - 4	N	Y	Y	Y	N	N	N	N	N	P
J44	1 - 10	N	N	N	N	N	N	N	N	N	N
J11	1 - 2	N	Y	Y	Y	N	Y	N	N	N	Y
J10	1 & 5	N	N	Y	N	N	N	N	N	N	Y
	2,3,4,6,7	N	N	Y	N	N	N	N	N	N	N

J7	1 - 3	N	Y	Y	Y	N	Y	N	N	N	N
J24	1	N	N	Y	Y	N	N	N	N	N	P
	2 - 4	N	N	Y	Y	N	N	N	N	N	N
J26	1,3,4,5	N	Y	Y	Y	N	N	N	N	N	P
	2	N	Y	Y	Y	N	N	N	N	N	N
	6	N	Y	Y	Y	N	N	N	N	N	Y
J33	1	N	N	Y	Y	N	Y	N	N	N	P
	2 & 3	N	N	Y	Y	N	Y	N	N	N	N

8. Implementation in accord with the IEP

As the charting and discussion above illustrate, there was some reasonable programming done by the District for this Student. However, implementation of those plans fell far short of what was necessary, as evidenced primarily by the District's own documentation. Although a lot was made of the lack of implementation during the 1989-90 school year, based upon the documentation in the Student's record, implementation efforts fell considerably short of the IEP's throughout the last three years. Once again, not to say that the District's efforts have been anything but energetic, or even heroic, in light of what other districts may or may not be doing in this programming area. However, the measure of implementation must be as set forth in the IEP documentation.

D. REASONABLY CALCULATED IEPs?

The Hearing Officer found Dr. Pumpian's opinions regarding appropriate programming for this Student persuasive, and not demonstrably affected by any other evidence. In fact, Dr. Martin's testimony, though it may have had a different focus (vocational skills), substantially corroborated the methods suggested by the Parents' expert. The following excerpts from Dr. Pumpian's report illustrate the deficits in the District's programming approach as compared to an approach which would have been appropriate for this Student:

> [The Student's] goals/objectives for many programs has independence as a performance goal. Her parents have emphasized independence as a major goal for [the Student]. In my discussions with staff, several mentions were made of attempting to honor this goal. The problem and confusion I observed was assuming that if independence is a goal of instruction, then it should serve as a basis for the instructional format used. As a result, [the Student] is basically afforded exposure to environments and tasks and given feedback in the form of corrective prompts when skills are not performed correctly. (This is called organized exposure with feedback.) The associated data sheets if available first basically list the skill sequence and then list which skills require corrective prompts and the type of prompt that was required. Organized exposure with feedback is the least

intrusive form of intervention. It is identified primarily for fluency building and it does allow for students to perform tasks very independently. I am convinced that this technique is being overused since [the Student's] performance indicates to me more specific interventions are required which focus on her communication, initiation, compliance, detail and maturity in performing and completing tasks. An organized exposure with feedback instructional approach for tasks that [the Student] already demonstrated physical capability to do is not an appropriate intervention strategy to deal with these skill needs. Organized exposure with feedback is appropriate to be used periodically to establish baseline, present levels of performance, encourage independence. It is however, an inappropriate strategy to be used in isolation of other more aggressive interventions, especially given types of data and comments made over the three-year period in question. Rather, intervention strategies should have included a variety of antecedent teaching procedures and/or aggressive planned consequential teaching procedures. Simply stated, antecedent teaching procedures are recognized as those which provide information/prompts to a student before an activity is initiated and/or before a skill error can occur. These procedures are designed to reduce errors, the practice of bad habits, and are often referred to as errorless training strategies. Antecedent teaching procedures proactively focus on skill deficits, require lesson plans, and often instructional sessions prior to actually entering the targeted environment/activity. These teaching sessions can include simulation, practice, demonstrations immediately prior to functional performance. Given [the Student's] age these traditional instructional methods should have been employed and should have been specifically focused upon her communication, her behavior, her maturity in approaching specific activities and skills.

* * *

Simply stated, consequential teaching procedures refer to information prompts provided after an activity is concluded or after an error or skill is performed. Organized exposure with feedback represents part of what is considered consequential teaching. Once again, however, given [the Student's] behavior and communication needs, not only should prompt and reinforcement have been more specifically planned for, but also times to review her performance and activities should have been built into her instructional day. These review times, once again, focus on strengths of her performance and areas of need and would become ways to provide additional materials and practice in areas specifically related to her communication, behavior, maturity, etc. . . . In sum, the educational program has confused the goal of independence with using independence as an instructional strategy. Given [the Student's] skill performance record over three years it is clear that other education needs are interrupting her ability to perform skill sequences independently.

The Student's IEPs, over the school years 1987-88 through 1989-90, overall, were not reasonably calculated to render educational benefit to the Student. The District focused on independence as a means and strategy to attain independence. The District paid too little attention to the Student's needs in the areas of socialization, communication, self-management, and behavior. The District's argument that its efforts at planning and implementation should be compared to the standards set by other districts is not meritorious, nor has any authority been cited to support it. The only standard for the education of a handicapped student is that mandated by the EHA, its regulations, the CECEA, its regulations, and the State Plan.

E. EDUCATIONAL BENEFIT?

It cannot be said that the Student did not enjoy some benefit from her last three years in the District. She benefited from: some opportunities to experience the world of work, including acquisition of some generalizable job skills; some opportunities to socialize; and some improvement in her verbal articulation. Overall, however, because of deficits in the programming and implementation of that programming, especially in the areas of behavior, socialization, communication, and self-management, the Student is not appreciably further towards having the basic skills of independence than she was at the time of the May 1985 Triennial.

V. REMEDIES

The Parents seek: three years "compensatory education" beyond age twenty-one; prospective relief consisting of an independent evaluation in the Fall of 1990, in accord with Fed. Regs. 300.503 (b) & (d), for the purpose of assisting in the development of the Student's 1990-91 IEP, and for that evaluator to monitor the progress of the Student every three months; and attorney's fees and costs in accord with the State Plan.

A. COMPENSATORY EDUCATION.

The Parents cite the case of Burr v. Ambach, 863 F.2d 1071 (2d Cir., 1988) for the proposition that compensatory education is an appropriate remedy in this action. That case, involving a severely handicapped student who was totally deprived of access to public education for a period of time just preceding his twenty-first birthday, stands for the proposition that: Congress did not intend to create a right without a remedy; and a child should not be deprived of an education just because his parents couldn't front the money while wending their way through the legal process.

Also cited is Miener by and through Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986), involving a child suffering from serious educational, emotional, and behavioral disorders who was denied access to public education at age 14. After some nine years of procedural run-around and denial of rights under the EHA, the Court of Appeals ruled that she was entitled to compensatory relief, provided she demonstrates violation of the EHA.

The Court in Jefferson County Bd. of Education v. Breen, 853 F.2d 853 (11th Cir. 1988), again involving the education of a student with severe emotional and physical problems, stated the following:

> Compensatory education, like retroactive reimbursement, is necessary to preserve a handicapped child's right to a free education. Without it, the child's right would depend upon his or her parent's ability to fund the education during the years of administrative proceedings and federal court litigation. at p. 857-8

The decision in Campbell v. Talladega, 518 F. Supp. 47 (D.C. N. Dist of Alabama, 1981) spelled out specific relief for the failure of public schools to provide appropriate programming for a severely retarded child. That program provided the student with instruction in a setting which was not in accord with the "least restrictive environment" requirements of the EHA and was not staffed with sufficiently trained personnel.

An award of compensatory education, at this point in time, is troublesome for two reasons: first, there is no provision in the EHA, nor Colorado law, which gives authority to a hearing officer to formulate such relief; and second, there is no evidence in the record of what any particular curriculum will require, timewise, to make up for what the District has not done. This Hearing Officer is inclined to accept the general notion that Congress did not intend to create a substantial right without a plain and expedient remedy. However, without authority of law to do so, this Hearing Officer will not grant relief which extends beyond presently relevant programming, even though he is inclined to do so.

B. ATTORNEY FEES

In the course of the hearing, the issue was raised regarding the Hearing Officer's authority to render a decision and award respecting Parents' attorney fees. The District took a position that the EHA allowed for an attorney fees award only by a court under the EHA Sec. 1415 (e)(4). In addition, the District cited the case of Mathern v. Campbell County Children's Center, 674 F.Supp. 816 (D.C. Wyo. 1987) for the proposition that even attorney fees incurred in the course of a due process hearing could be the subject of such an award, but by a court only.

The State Plan goes beyond the EHA in this regard. Where the EHA has imposed upon the States the obligation of promulgating procedures to protect, for parents and their children, the provision of a free appropriate public education, it has also left open for the States to develop even more stringent protections. The

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State Plan addresses attorney fees, as follows:

a. A parent who prevails in any action or proceeding brought under Section 615 (Procedural Safeguards) of the Education for All Handicapped Children Act of 1975 [20 USC 1415], may seek to recover reasonable attorney's fees and related costs pursuant to Sections 1 and 2 of the Handicapped Childrens' Protection Act of 1986 [20 USC 1415 (e)(4) & (f)]. Recovery of attorney's fees and related costs are subject to the following limitations:

(1) If the school district, other public agency or the state has not unreasonably protracted the final resolution of the proceedings, and there is no finding of a violation of the student's procedural safeguards, the fees may be reduced if:

i. The parent/guardian "unreasonably" protracts the controversy.

ii. The fees "unreasonably" exceed rates prevailing in the community.

iii. The time spent and legal services furnished were "excessive" considering the nature of the proceeding.

The State Plan provisions regarding attorney fees are distinct from the provisions of the EHA, in that there are omitted provisions respecting offers of settlement. If the State were intending to only parrot the provisions of the EHA, but not give authority to the Hearing Officer to make an award, then why not recite the provisions of the EHA in their entirety? This particular treatment of the subject persuades this Hearing Officer that he has jurisdiction upon this issue.

VII. DECISION SUMMARY

In accord with the above-stated findings of fact and law, the following rulings are made with respect to the Parents' claims:

A. For the school years 1987-88 through 1989-90, the District failed to develop, design or implement an Individualized Education Program for the Student which was reasonably calculated to enable her to receive reasonable educational benefit, and from which she did not receive meaningful benefits, for those years;

B. For the school years 1987-88 through 1989-90, the District failed to develop and design Individualized Education Programs for the Student, in compliance with the documentation requirements of the EHA, its Fed. Regs, the CECEA, and the State Plan, a violation of "procedural safeguards";

C. For the school years 1987-88 through 1989-90, the District failed to afford the Student's Parents a meaningful opportunity to participate in the development of the Student's IEPs, a violation of "procedural safeguards";

D. For the school years beginning 1990-91 (including the

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extended school years, Summers of 1990 and 1991), and not later than 60 days from the date of this ruling (subject to availability of the Student for assessment) the District shall provide, at no cost to the Parents, an independent evaluation and comprehensive assessment, with written report of same, of the Student's: present level of functioning; degree to which independence may reasonably be expected to be attainable; and educational needs;

E. For the school year 1990-91 (including the Extended School Years, Summers of 1990 & 1991), and not later than 60 days from the date of this ruling (subject to availability of the Student for assessment), the District shall conduct a staffing/IEP meeting, fully in accordance with the State Plan Part II, V. E., and shall give due weight to the report of that independent evaluator, and shall develop an IEP for the 1990-91 school year;

F. Said IEP shall, at a minimum, program for the Student in the domain areas of: Vocation; Domestic; Community; and Socialization, and shall address needs for: behavior management; communication; and self-management, with a view towards that independence which she may reasonably be expected to attain;

G. For the school year 1990-91 (including the Extended School Years, Summers 1990 and 1991), the District shall provide, at no cost to the Parents, independent evaluations of the Student's: present levels of functioning; degree to which independence may reasonably be expected to be attainable; educational needs; and implementation of prior IEPs, on at least a quarterly basis, to be followed by meetings to review and/or adjust such IEP's;

H. For said independent evaluations, the evaluator shall be acceptable to both the District and the Parents, and in the event no agreement can be reached, each of the Parties shall select a person qualified in the area of educating the Student, with her specific handicapping conditions and needs, which persons shall in turn select a person agreeable to both of them, likewise qualified, which third person alone shall serve as the independent evaluator to carry out this ruling;

I. Immediately upon receipt of this ruling, the District shall contact the Parents and this Hearing Officer by telephone, and schedule a hearing for the purpose of determining an appropriate award of attorney fees and costs, in accordance with the State Plan.

DATED this 29th day of May, 1990.

David C. Hoskins
Impartial Hearing Officer

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of this FINDINGS AND DECISION OF THE IMPARTIAL HEARING OFFICER were delivered to the following by either hand-delivery at 10841 S. Parker Rd., Parker, Co, or hand-delivery to the below-noted addresses by professional messenger service, this 29th day of May, 1990:

Darryl Farrington, 6300 S. Syracuse Way #555, Englewood, Co
William R. Baesman, 1401 17th Street, Denver, Co
Littleton Public Schools, 5776 S. Crocker, Littleton, Co
Colorado Department of Education, 201 E. Colfax Ave., Denver, Co

Case Number: LS90:101

Status: Impartial Hearing Officer Supplemental Decision

Key Topics: Attorney Fees

Issues:

- Are parents entitled to an award of fees and costs as the prevailing party?
- Does the hearing officer have the authority to award attorney fees and costs?

Decision:

- Hearing officer has the authority to award attorney fees and costs.
- Parents incurred no attorney fee debt since one parent was a licensed attorney and represented own interests.
- Parents entitled to fees for other attorneys engaged in their behalf.

Discussion:

STATE OF COLORADO
BEFORE AN IMPARTIAL HEARING OFFICER
COLORADO DEPARTMENT OF EDUCATION NO. [redacted] LS90:101

FINDINGS and DECISION OF THE IMPARTIAL HEARING OFFICER REGARDING PARENTS' COSTS AND ATTORNEYS FEES

In the Matter of the Educational Placement of a Student,

S.L.B.,

Concerning

ARAPAHOE COUNTY SCHOOL DISTRICT NO. 6 / LITTLETON PUBLIC SCHOOLS,

and

[redacted]. and [redacted]., parents and co-guardians of the Student.

The issue of an award of attorneys fees and costs is presented upon the "Motion for An Award of Attorneys' Fees and Costs" filed by the Parents, June 4, 1990, and "Memorandum of Points and Authorities" filed by the District, June 5, 1990. A Hearing was held June 6, 1990, and appearing were: Mr. Farrington, Attorney at Law for the District, together with Ms. Clement and Mr. Farrell, Staff representatives for the District; and the Parents, represented by the Father, who is an attorney at law licensed to practice law in the State of Colorado.

The Parents claim attorneys fees and costs in the total amount of $ 63,186.58, and presented the fee affidavit of the Father, on behalf of himself and his law firm, together with the expert testimony of Elizabeth B. Kolkowski, an attorney licensed to practice law in Colorado with particular experience in litigation in the field of the Education of the Handicapped Children's Act. The evidence supported the hourly rates stated in the Attorney Fee Affidavit, and the necessity of the services performed.

The District opposed the award of attorney fees, raising two issues: first, it is contended that the Hearing Officer has no authority to make such an award, such relief being reserved for the Courts; second, such an award should be limited pursuant to statute, in light of a timely settlement offer that was comparable to the relief granted by this Hearing Officer. The District stipulated that neither the number of hours invested by Parents' Attorney, nor the services rendered were excessive.

HEARING OFFICER'S AUTHORITY

This issue was addressed in the "Findings and Decision of the Impartial Hearing Officer" dated May 29, 1990 at pages 38 and 39. The Hearing Officer, on June 6, 1990, entertained the District's Motion for Reconsideration (made within its "Memorandum of Points and Authorities") of his prior ruling that the Hearing Officer has the authority to determine attorneys fees.

Both Parties took the position that the State Plan is unambiguous, the District contending that the State Plan incorporates the Handicapped Children' Protection Act of 1986 (20 USC 1415 (e)(4) & (f)), and the Parents contending that the State Plan goes beyond the HCPA, by setting out portions but not all of its provisions, and thereby gives the Hearing Officer authority to determine this issue. The District called Dr. Brian McNulty, Executive Director of Special Education of the Colorado Department of Education, who offered testimony on the intent of the Department upon this issue. Upon objection of the Parents to the testimony of a person responsible for drafting the State Plan, as opposed to some documentation of the intent of the drafters, Dr. McNulty's testimony was not received (Colorado Department of Social Services v. Board of County of Commissioners, 697 P.2d 1 (Colo. 1985).

There being no amibiguity found in the State Plan, and no new argument offered by the District, consistent with his earlier decision, the Hearing Officer denied the District's Motion for Reconsideration. Even if there had been a finding of ambiguity in the State Plan, there was no admissable evidence offered of the intent of the Colorado Department of Education upon this issue.

AMOUNT OF ATTORNEY'S FEES AND COSTS

The Parents having prevailed in their claims, and there having been a finding that there were violations of Procedural Safeguards, they are awarded attorney fees and costs, in accord with the guidelines of DR 2-106 (Code of Professional Responsibility for Colorado), as follows:

1. The time and labor required for presentation of Parent's claims is virtually undisputed, particularly in light of the uniqueness of disputes under the Education of All Handicapped Children Act, and the inherent complexities of the subjective issues involved;

2. Whether of not the Father, who acted as his own attorney, in conjunction with other members of the firm for who he works, and seeks payment for those services in the amount of $47,925.00, should be compensated for representing himself, was not sufficiently answered by the evidence. To the contrary, the agreement between the Parents and Fathers employer contained the following provision:

> No fees will be charged unless an award of attorneys' fees is made at the culmination of the action by the Court. Costs

will be billed and payable monthly.

Such language is evidence of the Parents incurring no attorneys fee debt, and, in light of that language, there was no evidence of an actual cost to the Parents for attorney services, exclusive of out of pocket costs;

3. Fees customarily charged in the locality range from $110 to $180 per hour, depending upon the experience of the professional;

4. The $63,186.58 is compared favorably to the resulting decision in favor of the Parents;

5. The time limitations of the hearing process under the EHA imposed upon both parties would certainly justify extra efforts, and additional attorneys as engaged by the Parents; and

6. The experience, reputation, and abilities of the Parents attorneys certainly justify a finding that the hourly rates charged reflected a value for their services which was not excessive.

The Parents are awarded, for their attorney fees and costs, the sum of $15,261.58, representing their claim of $63,186.58 less the amount charged for the services of the Father ($47,925.00). By stipulation of the Parties, the thirty (30) days for filing of an appeal to the State Department of Education commences with the announcement of this Decision, June 6, 1990.

DATED this 6th day of June, 1990.

David C Hoskins

David C. Hoskins
Impartial Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of these FINDINGS and DECISION OF THE IMPARTIAL HEARING OFFICER REGARDING PARENTS' COSTS AND ATTORNEYS FEES are deposited in a receptacle of the U. S. Postal Service, postage prepaid, addressed to the following, this 6th day of June, 1990.

Littleton Public Schools, 5776 S. Crocker, Littleton, Co 80120
Darryl Farrington, 6300 S. Syracuse #555, Englewood, Co 80111
William Baesman, 1401 17th St. #1100, Denver, Co 80202
Colorado Department of Education, 201 E. Colfax, Denver 80203

David C Hoskins

Case Number: L90:102

Status: Impartial Hearing Officer Decision

Key Topics:
Individualized Educational Plan (IEP)
Special Olympics
Change of Placement
Attorney Fees
Aide Services

Issues:

- Whether child was receiving services call for in IEP.
- Whether removal of an aide from child's classroom constituted a change in placement without affording parents procedural safeguards.

Decision:

- Special Olympics was made a characteristic of service on the IEP and was not provided.
- Displacement of aide and combining of two class periods into one class did not constitute a change in placement.
- Student did not receive all of the services required by the IEP particularly individual assistance in certain areas.
- No authority to assess attorney fees or costs.

Discussion:

- Process of current IEP development.
- Specific provisions in IEP.
- Pertinent incidents in course of child's school year not evaluated as called for in IEP.
- Alterations in program were more in the nature of variations to program rather than a change in placement.
- Changes to program not significant enough to invoke stay-put provision.
- Interdisciplinary team involved with student not involved in decision to combine classes.

In re the Matter of:

[redacted],

By and through his mother

[redacted]

Petitioner,

v.

COLORADO SPRINGS SCHOOL DISTRICT 11,

Respondent.

AMENDED
FINDINGS AND DECISION
of
Impartial Hearing Officer
Joseph M. Goldhammer

Case #: L90:102

I.

INTRODUCTORY STATEMENT

THE HEARING was held on April 5 and 11, 1990, at the school administration building in Colorado Springs, Colorado. Jurisdiction is conferred by 20 U.S.C. § 1415, 34 C.F.R. §300 et seq. and Part VII of the current Colorado Department of Education State Plan. The Petitioner was represented by Sarah J. Christensen, 805 South Cascade Avenue, Colorado Springs, Colorado 80903. The Respondents were represented by Nancy Westmoreland of Anderson, Johnson & Gianunzio, 104 S. Cascade Ave., Suite 204, Colorado Springs, Colorado 80903.

The hearing was held pursuant to a request by Petitioner filed January 25, 1990. The issues stated in the request for hearing were (a) non-delivery of service, as provided for in the current IEP, and (b) change of program placement without proper notice. At the outset the District contended that the issues were moot because an aide who had been displaced from [redacted] program had been replaced in the classroom as of March 14, 1990. The Hearing Officer ruled that the case was not moot and proceeded to accept evidence on the issues as stated in the Request for Hearing.

Section VII.B.2.g.(1) of the current state plan provides that a decision must be rendered and mailed within 45 days after receipt of the request for hearing. Section VII.B.2.f. provides that the parties may agree that the time to reach a decision and mail findings may be extended up to an additional 45 days. The parties agreed upon this additional 45 days' extension.

II.

FINDINGS OF FACT

The hearing officer makes the following findings of fact based upon the evidence adduced at the hearing:

1. [redacted] is a 18-year-old student in the SLIC program at Palmer High School. His current Individualized Education Program (IEP), which was finally signed by his mother on 3-20-89, identifies [redacted] handicap as multiple/autistic. Between 1987 and March 1989, [redacted] shared his time between the ASIEP (Autistic Screening Instrument for Education Planning) and SLIC (Significantly Limited Educational Capacity) programs. As of March 1, 1989, [redacted] was placed exclusively into the SLIC program.

2. [redacted] progress in the combination ASIEP/SLIC program warranted his graduation into the less restrictive SLIC program in March 1989. In the ASIEP program, students are taught in one-to-one instruction or in very small groups. SLIC students are taught in larger groups, and are generally more advanced.

3. The current IEP was the subject of long negotiations between the parties over several dates in late 1988 and early 1989. Some of the salient provisions of the IEP (District Exhibit 1) are as follows:

A. Under the descriptions of service, an interdisciplinary team was established including the current service providers and the parent to promote consistent communication, the development of instructional strategies, data collection, and to monitor James' progress and learning style. (Page 4, para. 14.)

B. Individual assistance is to be provided to [redacted] as necessary as determined by this monitoring team. (Page 7, addendum para. 14.)

C. Attendance at school assemblies would involve integration with other regular education students. (Page 6, addendum para. 8.)

D. Retesting of the street survival skills was to be administered by the ASIEP coordinator, Marcia Braden. (Page 7, addendum para. 16.)

E. [redacted] was to continue in Special Olympics as a characteristic of service (Page 8, addendum, para. 19.)

F. [redacted] was to have a language-based curriculum to increase his vocabulary in the language he commonly used in every day life activities. (Page 5, addendum, para. 4.)

G. As a goal of his curriculum, [redacted] was to develop safe, efficient orientation and mobility skills at 100%. (Page 5, addendum, Goals para. 7.)

H. The IEP stated that [redacted] needed to increase his attending behavior in large and small groups, and he was to develop the ability to work productively with the minimum of assistance (addendum, p. 4).

4. Through the summer of 1989, [redacted] was assigned a one-on-one aide, Carol Norris. Ms. Norris wrote in a traveling notebook as provided for in the IEP in which she communicated

with [redacted] parents regarding his progress and other concerns regarding his education and safety.

5. In the fall of 1989, Ms. Norris continued to be an aide at Palmer High School and was assigned to [redacted] period 1, 3 and 5 classes. However, beginning in the fall of 1989, Ms. Norris no longer was [redacted] one-on-one aide. However, she continued to write in [redacted] traveling notebook. Ms. Norris noted from time-to-time that [redacted] had difficulty in safely crossing the streets. In the fall of 1989, [redacted] parents were not informed that Carol Norris was no longer a one-on-one aide for [redacted]. Ms. Norris continued to function as an aide generally in the SLIC program through the fall.

6. [redacted] monitoring team met monthly throughout the fall of 1989, but due to scheduling conflicts, one monitoring team member, Marcia L. Braden, was unable to attend on a consistent basis and therefore was not able to follow his program consistently (Ague Ex. 8). Ms. Braden was engaged by the District as a consultant to participate in the monitoring team and advised the District regarding [redacted] education. Partially as the result of Ms. Braden's inability to follow [redacted] program consistently, the monitoring team failed to achieve its purposes satisfactorily. Its failure to function effectively also is attributable to the failure to give Ms. Braden adequate notice of the changes in [redacted] program.

7. During the fall semester of 1989 and the spring semester of 1990. [redacted] had five instructional periods at Palmer High School. After school, he held a job at Western Sizzling Steak House in Colorado Springs.

8. Beginning in late January, 1990, with the commencement of the second semester of the current academic year, two changes took place within the SLIC program which had an impact upon [redacted]. First, Carol Norris was laid off as an aide in the program due to budgetary constraints. Second, [redacted] third and fourth period classes were combined utilizing a team teaching approach with two or three teachers and one aide. Math and social skills were taught in this combined course in a "community based curriculum."

9. In the first semester of the current academic year, [redacted] classes in the SLIC program had approximately seven to ten students. In the combined third and fourth period classes second semester, there were approximately 17 tc 20 students. However, due to the team teaching approach, there were two to three teachers in the combined classroom, resulting in no drastic change in student-to-staff ratios.

10. On March 14, 1990, another aide was hired to replace Carol Norris in the SLIC program.

11. Both Marcia Braden and Elmer Ammons, [redacted] primary service provider and teacher, testified that there is more distractibility in the larger classroom with a lot more activity. Mr. Ammons testified that several of the students need significantly more attention than does [redacted] and they may occupy teachers on a one-on-one basis leaving less time for [redacted] with individual teachers. Braden testified that the larger class represented a "fairly significant change" for James.

12. [redacted] engages in perseverative behaviors as a part of his handicap. Those behaviors consist of repetitive conduct, such as tapping his hands on the table or removing and replacing the cap on a pen while devoting much of his concentration to those behaviors. When [redacted] lapses into those behaviors, a staff member should intervene as quickly as possible to remind James to cease this conduct.

13. Prior to the implementation of a community based program during third and fourth periods with the team teaching technique, Ms. Braden of the monitoring team was not informed of that change. Therefore, the fall monitoring team did not assess the potential impact of the large class upon [redacted].

14. During his third and fourth period classes, [redacted] is removed from the classroom approximately twice a week to undergo speech therapy with Kenneth Lee, a highly qualified speech

therapist. Also, on Tuesdays and Thursdays, the large group meets for only third period, and in fourth period [redacted] goes to a smaller group where Mr. Montero teaches [redacted] math in a group of approximately seven students. Thus, out of [redacted] 25 class periods per week at Palmer High School, only approximately 5 to 7 of those are in the large combined class.

15. In the interdisciplinary team meetings, Marcia Braden requested that data be collected by the classroom staff to monitor [redacted] behaviors and progress. However, this data collection, if done, was never reported to her. Marcia Braden herself visited [redacted] larger classes and noted an increase in his perseverative behaviors during those classes in comparison with the smaller classes. Likewise, data collected by [redacted] suggest that the staff is not able to interdict those behaviors as frequently as in small classes, and they do not do so. While the ratio of staff to students is highly similar to that in the smaller classes, that program is not individualized to [redacted] at the present time.

16. After receiving complaints from [redacted] regarding the requirement that students cross several busy streets during rush hour to travel to the adaptive physical education class in the gymnasium, Ron Hague, Director of Special Education, arranged to have the students transported to that class in a bus. That step

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resolved the safety issue insofar as that class is concerned, but was not designed to teach the students street-crossing skills.

17. [redacted] has withdrawn her permission to have [redacted] go on field trips with his community based classes since she is dissatisfied with the safety arrangements on those field trips in the absence of a one-on-one aide to attend to [redacted] safety concerns.

18. Due to the unavailability of a testing instrument, [redacted] was not tested for street survival skills in accordance with a requirement of his IEP. (Page 7, addendum, number 16.)

19. While Special Olympics is a characteristic of service in [redacted] IEP, the parties disagree on the meaning of the term "Special Olympics as a characteristic of service." Ron Hague testified that it simply means that [redacted] can be excused from school to participate in Special Olympics. [redacted] testified that it was her understanding that [redacted] was to be entitled to a full panoply of services, similar to those provided by a teacher at North Jr. High (Chris Matthews) who supervised [redacted] Special Olympics activities until early 1988, including coaching, transportation, and data collection. [redacted] has not been receiving these services since. The hearing officer finds that Special Olympics was made a characteristic of service of the IEP by the March 1, 1989 amendment of the IEP on page 8 and that, at

the very least, this means that the staff at Palmer will fully cooperate in assuring that notices of Special Olympics events are transmitted to parents through the school, that he should be properly excused from school for Special Olympics, and that the school district should make good faith efforts to accommodate [redacted] insofar as possible up to the levels provided by Mr. Matthews at North Middle School.

20. [redacted] does not attend most school assemblies, because they are held seventh period, while [redacted] is at work. Nevertheless, on those few occasions when school assemblies are held earlier in the day, [redacted] is seated with special education students exclusively. Elmer Ammons testified that all students are seated in assemblies by class but that some of them intermix despite the seating arrangement. [redacted] only contact with handicapped students at school assemblies occurs when he walks in and out of the auditorium.

21. One of the goals of field trips is to teach students safety and mobility in the community.

22. The [redacted] principal complaints insofar as [redacted] academic instruction center around the third and fourth period combined class. On the whole, [redacted] is satisfied with [redacted] progress with his second and fifth hour classes as well as in his adaptive P.E. class.

23. Marcia Braden testified that the concept of individualized instruction is not being fulfilled in the large combined class. She further stated that, while some aspects of [redacted] education are a language-based curriculum, this is also not occurring in the combined classes on the limited occasions when she observed that class. Mr. Ammons, however, stated that the curriculum in the large class is language based.

24. Marilyn Morgan, chair of the Special Olympic Blue Dragons, testified that she had difficulty getting notices of Special Olympics transmitted through the Palmer staff to parents.

25. Based upon the above evidence, the hearing officer finds that the changes which occurred at the beginning of the spring semester 1990 including the displacement of aide Carol Norris and the combining of the third and fourth period classes did not constitute a change in the educational placement of [redacted] within the meaning of 20 U.S.C. § 1315(b)(C).

26. Based upon all the evidence, the hearing officer finds that [redacted] has not received all services as provided for in his Individual Education Program. The interdisciplinary team approach provided for on page four of the IEP has not been complied with to provide consistent communication, and to facilitate the development of instructional strategies, and to monitor [redacted] progress and learning style. As a result,

[redacted] education in the large 3rd and 4th period class has not been individualized. Additionally, [redacted] has not been retested for street survival skills, and the district has not provided participation in Special Olympics as a characteristic of service.

III.

DISCUSSION AND CONCLUSIONS

A.

The first issue before the hearing officer is whether the changes which took place at the beginning of the second semester of the 1989-90 academic year constituted a change in placement under the Education for the Handicapped Act and in particular 20 U.S.C. § 1415(b)(1)(C). Counsel for the District cites several cases including Concerned Parents v. New York City Board of Education, 629 F.2d 751, 54 ALR Fed. 559 (2nd Cir. 1980); Lunceford v. District of Columbia Board of Education, 745 F.2d 1577 (D.C. Cir., 1984); and DeLeon v. Susquehanna School District, 747 F.2d 149 (3rd Cir. 1984). Petitioner contends that these legal authorities are not applicable, since they are from jurisdictions other than the Tenth Circuit. Petitioner argues that the State Plan's definition of placement is more expansive and supersedes these cases in any event. The State Plan, p. 49, defines a placement as the "environment" in which a handicapped person receives the special education and related services which fulfill the objectives of the IEP.

However, the term "environment" as utilized in the State Plan is no more precise in meaning than the term "change of placement" as utilized in the EHA. Therefore, we can look to the cases cited by the District for some guidance regarding meaning of the term "change of placement".

The determination of that meaning, while enlightening, is not critical for the determination of this case. The Concerned Parents, Lunceford, and DeLeon cases all examine the question of what constitutes a change of placement in the context of a Federal Court injunctive proceeding in which the plaintiff was seeking to enforce the "stay put" provision of the EHA, 20 U.S.C. § 1415(e)(3). If a handicapped child can prove a "change in educational placement" he must be kept in his then current educational placement until all proceedings under the EHA have been completed. In the present case, however, while the [redacted] seek numerous remedies, they do not seek the invocation of the "stay-put" provision.

While a change in placement also triggers the requirements of prior written notice and a hearing, the petitioner here received notice of the removal of the aide and of the combining of the third and fourth period classes at or about the beginning of the second semester and did request a hearing prior to the beginning of the semester. Thus, that procedural protection which accompanies a change in placement has been fulfilled in this case in any event.

While not fundamental to the decision in this case, the hearing officer is disinclined to find that the variations in [redacted] program at the beginning of the second semester constituted a change in educational placement as defined by the EHA. Concerned Parents as followed in Lunceford both hold that a change in educational placement occurs only when there is a change in the

> "[g]eneral education program in which a child...is enrolled, rather than mere variations in the program itself."

Lunceford, supra, 745 F.2d at 1582 citing Concerned Parents, 629 F.2d at 754. The alterations in services provided to [redacted] constituted variations in his program rather than changes in his general educational placement. He was enrolled in the SLIC program both the first and second semesters of the 1989-90 academic year.

Even under the more expansive reading adopted in DeLeon, [redacted] educational placement was not changed at the outset of the second semester. That case holds that a change in placement occurs when "the decision is likely to affect in some significant way the child's learning experience." This is an extremely subjective test. However, even Marcia Braden testified that the changes which occurred at the outset of the second semester were only "fairly significant." It is this hearing officer's subjective view that those changes are simply not significant enough to require the school district to maintain the status quo during the pendency of these proceedings.

However, that determination is mainly academic, because as both Lunceford and Concerned Parents make clear the inquiry must continue even after the determination that a change in educational placement has not occurred, because the parents of a handicapped child can obtain an impartial due process hearing under 20 U.S.C. § 1415(b)(1)(E) by contending at any time that their child is not receiving a free appropriate public education. As Lunceford states,

> Thus a parent or guardian always has an opportunity to present complaints relating to a child's educational placement, even if the situation complained of does not amount to a change in educational placement.

Lunceford, supra, at 1578 fn. 1. The parent is always free to contend that his child is not receiving a free appropriate public education as the result of violations of his individualized educational program, since, by definition, a free appropriate education must be provided in conformity with the IEP. 20 U.S.C. §1401(18)(D). That is precisely what Petitioner contends here, and that is the essence of Petitioner's case in any event.

Thus, although the hearing officer determines that [redacted] educational placement did not change during the second semester, we must proceed to determine whether his IEP was violated in spite of the lack of any change in educational placement.

B.

The hearing officer will proceed to determine whether [redacted] IEP was violated. That determination is not barred by lack of notice to the school district. [redacted] Ex. 1, the Request for Hearing, clearly specifies that one of the issues in this case is the non-delivery of service as provided for in the current IEP.

Likewise, determination of that issue is not barred by the fact that some of the variances in [redacted] program were motivated by budgetary reasons.[1]

The Petitioner's claims that his IEP has been violated fall into two broad categories. First, Petitioner makes several claims of violations based upon the curriculum and content of his community based-education class in periods three and four second semester. The [redacted] contend that the combined class does not have a language-based curriculum, that [redacted] is not receiving individual instruction to develop his functional skills in that class, and that he is not receiving individual assistance to be provided as necessary as determined by the monitoring team in that class. These claims are argued in parts B., C., and D. on pages 6 and 7 of Petitioner's Brief.

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[1] Since no change in placement occurred, Tilton v. Jefferson County Board of Education, 705 F.2d 800 (6th Cir. 1983) cited by the District is inapplicable. That case holds that if a school district must discontinue a program or close a facility for purely budgetary reasons, the stay put provisions of the act, 20 U.S.C. §1415(e)(3) do not require maintenance of the same educational placement. Here, no program was discontinued, no facility was closed, and Petitioner does not seek invocation of the stay put provisions.

Second, Petitioner argues that his IEP is being violated with respect to various service provisions relating to safety, a retest for street survival skills, participation in the Special Olympics, and integration during attendance at school assemblies. These complaints are set forth in parts A., E., F., and G. on pages 5, and 7 through 9 of Petitioner's Brief.

The first category of complaints, derives largely from the fact that the interdisciplinary team provided for on page four of the IEP was dysfunctional with respect to the decision to place [redacted] in a combined class of approximately 17-20 students during his third and fourth periods and to maintain him in that class throughout the semester. Marcia Braden testified that even though she was a peer member of the interdisciplinary team, she was not notified of the combination of the classes until after it happened. Thus, the decision to place [redacted] in that class was made without the communication required in the IEP and without the development of instructional strategies that are called for in that section of the IEP. Furthermore, after [redacted] placement in the class, Ms. Braden's requests for data collection and the monitoring of his progress in the course were not responded to.

All of the members of the disciplinary team must make every effort to cooperate, if [redacted] is to benefit from that effort. Scheduling problems, such as those demonstrated in [redacted] exhibit 8 are common among busy professionals, and must not stand in the way of [redacted] receipt of the Free Appropriate Public Education to which he is entitled. If the members of the team could not even agree upon a time to meet, it is no wonder they could not agree on substantive matters such as data collection and individualization of [redacted] education.

Ms. Braden's testimony, when taken as a whole, does not establish that [redacted] must be excluded from the large group classes. Indeed, he could benefit from those classes. Braden testified that [redacted] had a need to learn appropriate attending behaviors in large groups, and that it was possible to accord him individualized attention in a large classroom. The hearing officer concludes, however, that to achieve these salutary objectives in a large group, the monitoring team established by the IEP must be notified in advance of significant changes which will inevitably impact [redacted] education that it can devise strategies to cope with them.

While the testimony conflicted on whether the curriculum in the third and fourth period combined class was "language based," it is not seriously contested that [redacted] perseverative behaviors increase in the larger class, and that interdiction is not as immediate. His ability to benefit from that class was thereby diminished. The hearing officer finds that these perseverative behaviors have increased as a result of the failure of the monitoring team effectively to assess [redacted] individual needs and provide individual assistance in accordance with the IEP (addendum, p. 7, no. 14, and p. 4, no. 1). The hearing officer, however, is not convinced that the curriculum in the large third and fourth period class violates [redacted] IEP if he were able, with individual assistance, to fully participate in it and comprehend it.

The second category of complaints by Petitioner will now be addressed in order. First, Petitioner claims that [redacted] safety needs are not being met, and that the resort to a bus to transport the students to their morning adaptive PE class is no solution to that problem. However, this hearing officer would not suggest that the students in that morning class be taught safety by requiring them to cross extremely busy streets at rush hour. Mr. Ammons testified that street crossing skills can be taught on field trips, but [redacted] has withdrawn permission for [redacted] to participate in those trips. The addition of a new aide effective March 14, 1990, should provide sufficient supervision to assure [redacted] safety. However, an assessment as to whether he is learning independent street survival skills awaits the outcome of the test which was to be administered as a characteristic of service in accordance with Addendum, p. 7, paragraph 16, of the IEP. All parties agree that the test for street survival skills has not been administered due to the unavailability of that test. The District and its consultant, Marcia Braden, should make every effort to obtain that test as soon as possible, and if it proves to be impracticable to administer it, an amendment to the IEP should be arrived at between the parties to in some way assess [redacted] ability to conduct himself safely on the streets. If, due to no fault of the parties, a portion of the IEP cannot be complied with, it is insufficient to permit that portion of the IEP to remain in tact without addressing [redacted] safety need in some other fashion through the convening of a staffing to amend the IEP.

Next, Petitioner contends that the District has not provided participation in Special Olympics as a characteristic of service to [redacted] The parties disagree upon how this characteristic of service should be interpreted. The hearing officer concludes that it is reasonable to interpret paragraph 19 on page 8 of the Addendum of the IEP to require the District to assure that notice of Special Olympics events is transmitted to [redacted] parents, that he is properly excused from school, and that the District use its best efforts to procure the voluntary participation of staff at Special Olympics events in other ways such as in the collection of data and in coaching. The hearing officer concludes that the District did not intend to undertake a greater obligation than that in providing for Special Olympics as a characteristic service in [redacted] IEP.

Lastly, Petitioner complains that [redacted] was not integrated with all students during school assemblies. However, Elmer Ammons testified that all students are seated at assemblies by class, with some students intermixing in any event. Thus it would be anomalous for special education students to be seated in a disparate manner from the other students. So long as it is school policy to seat all students by class, the IEP is satisfied by permitting [redacted] to integrate with other students while passing to and from the assembly in the hallways, in the aisles, and in the auditorium. However, should regular students be permitted to intermix and to select their seats at random, [redacted] should be afforded the same opportunity. In other words, integration in this context means being treated the same as all other students.

IV.

DECISION

Based upon the above findings and conclusions, it is the decision of the hearing officer that:

1. Within 10 calendar days of the receipt of this decision, the interdisciplinary team shall meet at a time to be determined by Marcia Braden, which time shall be consistent with

consistent with the master agreement between the school district and its teachers, and shall devise and implement a plan to increase [redacted] attending behavior in the large group third and fourth period classes consistent with the need expressed on page four of the addendum of his IEP. Individual assistance shall be provided to [redacted] as necessary to increase those attending behaviors in accordance with the characteristic of service described on page 7 of the Addendum, paragraph 14. The plan shall include data collection techniques to determine whether by the end of the semester, the assistance provided [redacted] has increased his attending behavior in the large group. The team, at the expense of the district, with input from all its members, shall write and send to [redacted] parents within five days after the end of the semester a written report stating this determination and detailing the data upon which it is based. The report shall recommend whether [redacted] should continue in such large classes in the future. Ms. Braden shall assure that this report is compiled with the opportunity for input from all team members and is forwarded to [redacted] parents.

2. Within two weeks of the date of this decision, the ASIEP coordinator should determine whether it is practicable for [redacted] to be retested for street survival skills in accordance with paragraph 14 on page 7 of the Addendum to his IEP. If that is not practicable, the District shall follow procedures to amend the IEP and substitute an alternative method for determining

whether [redacted] possesses street survival skills.

3. The district shall implement procedures immediately upon receipt of this decision to assure that both [redacted] and his parents receive notices of Special Olympics events which are transmitted to the district by agents of that organization and that [redacted] is properly excused from school to participate in Special Olympics events. Furthermore, the district shall utilize its best (or good faith) efforts to inform faculty that they may volunteer their time to participate in the Special Olympics program and to encourage them to so participate.

4. The district shall assure that [redacted] is treated consistently with all other students during attendance at school assemblies; that is, if those students are seated by class, [redacted] shall be seated with his class, and if the students are seated by choice, [redacted] shall have the opportunity to choose his seat also.

5. The Petitioners' request for costs is inappropriate at this stage of the proceeding because this hearing officer has no authority to assess attorneys' fees or costs under Part VII.B.9. on page 59 of the State Plan. Such attorneys fees and costs must be awarded by a court of competent jurisdiction.

Dated in Denver, Colorado this 5th day of June, 1990

Joseph M. Goldhammer

Joseph M. Goldhammer
Hearing Officer
1563 Gaylord St.
Denver, CO 80206
(303) 333-7751

CERTIFICATE OF MAILING

The undersigned certifies that true copies of the foregoing Findings and Decisions have been placed in the United States mail, postage prepaid, this 5th day of June, 1990, addressed to:

Nancy Westmoreland, Esq.
Anderson, Johnson & Gianunzio
104 S. Cascade Ave., #204
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Denver, CO 80203

Case Number: S90:102

Status: State Level Decision

Key Topics: Appeals Procedure
Individualized Educational Plan (IEP)
Scope of Review
Characteristic of Service
Compensatory Education

Issues:

- Whether hearing officer erred in conclusions about Interdisciplinary Monitoring Team called for in IEP.
- Whether hearing officer erred in conclusions regarding individualization of student's program.
- Appropriateness of remedies including compensatory education.
- Whether IEP services were being provided.
- Whether removal of an aide from classroom constituted a change of placement without compliance with procedural safeguards.

Decision:

- Conclusions that monitoring team failed were correct.
- IEP makes special olympics participation a service to be offered to child by district with district staff participation.
- Student entitled to one-on-one aide in certain classes in order to meet IEP requirements.
- Conclusions regarding lack of individualization of program were correct.
- Violations of IEP were substantial and/or impacted significantly on the amount of educational value the student received from his education.
- Compensatory services ordered.

Discussion:

- Child's educational history.

Case Number: S90:102
Cont'd

- Content of IEP.
- Characteristics of service.
- Monitoring team functioning.

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SEP 10 1990

BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. [redacted] S90:102

DECISION UPON STATE LEVEL REVIEW

[redacted], by and through his mother, [redacted],

Petitioner,

v.

COLORADO SPRINGS SCHOOL DISTRICT NO. 11,

Respondent.

On April 5 and 11, 1990, a due process hearing was held in this matter before a Hearing Officer pursuant to the Education for All Handicapped Children Act (20 U.S.C. §1400 et. seq., "the Act") and Part II, VII.B.4 of Colorado's State Plan.[1] The issues raised at that hearing were a) whether the Colorado Springs School District No. 11 ("the District") had failed to provide services provided for in [redacted] current Individual Education Program ("IEP")[2] and b) whether certain actions taken by the District constituted a change of [redacted] placement. On April 25, 1990, the Hearing Officer issued his Findings and Decision in this matter and on June 5, 1990, the Hearing Officer issued his Amended Findings and Decision ("Amended Decision")[3] In his Amended Decision the Hearing Officer determined no change of placement had occurred but found that there had been a violation of [redacted] IEP as a result of the District's failure to provide certain services provided for in the IEP. The Hearing Officer ordered certain actions to be taken by the District to remedy the non-delivery of services for the future, but did not specifically order any compensatory education for [redacted].

As permitted by the Act[4] and provided for by the State Plan,[5] on May 25, 1990 the District sought state level review before an Administrative Law Judge ("A.L.J.") of certain aspects of the Hearing Officer's decision. Subsequently, [redacted] filed a cross-appeal.[6] Pursuant to the State Plan and order of the A.L.J. hearing this State-level review, written arguments were submitted by the District ("Respondent") on August 6, 1990; by the [redacted] ("Petitioner") on August 8, 1990; and by the District on August 9, 1990.[7] A review hearing including oral argument, additional testimony and the admission of an addition exhibit was held before Judith F. Schulman, Administrative Law Judge, Colorado Division of

Administrative Hearings, occurred on August 9, 1990, in Colorado Springs, Colorado. Following the review hearing the parties made certain additional filings which the A.L.J. has considered.

Throughout the State-level review proceedings Petitioner has been represented by Sarah J. Christensen, Esq., Lloyd K. Kordick Law Offices; and Respondent has been represented by Nancy Westmoreland, Esq., Anderson, Johnson & Gianunzio.

PRELIMINARY MATTERS

1. Early in this proceeding Petitioner argued the District was not entitled to file a partial appeal in this matter. The Administrative Law Judge ruled on July 5, 1990 that the filing of partial appeals was proper and would be permitted. The Administrative Law Judge, in addition, ruled that cross-appeals were also proper.

2. During the course of briefing this matter, at the review hearing, and following the review hearing, the District raised the question of what documents were actually included in [redacted] Exhibit 20 as admitted into evidence at the due process hearing before the Hearing Officer and also what documents the Administrative Law Judge should consider to be part of Exhibit 20 for the purposes of the review hearing. The A.L.J. determined as a matter of fact at the review hearing, subject to further review of the transcript, that Ague Exhibit 20 as admitted at the hearing consisted of only two pages from the March 20, 1989 Interdisciplinary Monitoring Team meeting. The A.L.J. further determined that there was no evidence of any intent by Petitioners to mislead Respondent as to the nature or content of Exhibit 20 as offered and admitted into evidence, and it would be inappropriate for the A.L.J. to expand Exhibit 20 beyond the two original pages that were admitted into evidence at the hearing below or otherwise consider any additional documents claimed by the District properly to be part of Exhibit 20. The arguments and filings of the parties subsequent to the review hearing have not altered the A.L.J.'s opinion in this regard. Accordingly, the A.L.J. rules that [redacted] Exhibit 20 consisted of only two pages (relating to the March 20, 1989 Interdisciplinary Monitoring Team meeting) and declines to consider for the purposes of this review hearing any additional documents proffered by the District as purportedly part of Exhibit 20.

3. The parties agreed prior to hearing to permit the admission by the District of an additional document, a written psychological evaluation of [redacted], performed by Dr. Robert Tinker in June 1990, as long as Petitioner had the right to cross-examine concerning that evaluation. Accordingly, at the review hearing the psychological evaluation, conducted and written after the due process hearing was held, was admitted into evidence and

Petitioner was afforded an opportunity examine Dr. Tinker concerning the evaluation.

4. In the briefs and at the review hearing the issue of the District's "budget defense" was raised as it relates to the question of change of placement. It appears from argument that underlying factual matters are in dispute concerning this issue and the District has failed to provide the A.L.J. with transcripts from the due process hearing relating to this issue. In any event, however, because of the result reached in this case concerning the question of non-delivery of services under the IEP, the A.L.J. has not reached the issue of change of placement and therefore need not consider the District's budget defense.

ISSUES UPON STATE LEVEL REVIEW

The District raises the following limited issues for appeal:

1. Whether the Hearing Officer erred in his conclusions regarding the manner in which the Interdisciplinary Monitoring Team (provided for in [redacted] IEP) functioned.

2. Whether the Hearing Officer erred in his conclusions regarding the failure to properly individualize [redacted] education.

3. A request for clarification that there was no violation of the IEP with regard to Special Olympics.

4. A determination that the remedy ordered by the Hearing Officer in paragraph 1 of the remedies portion of the Amended Decision is unnecessary.

5. A determination that the District was in complete compliance with the IEP, thus rendering all remedies ordered by the Hearing Officer inappropriate.

The Petitioner raised the following issues on cross-appeal:

1. Is compensatory education a proper remedy for the District's failure to provide [redacted] with an individualized education?

2. What is the proper remedy for the District's failure to provide Special Olympics as a characteristic of service pursuant to [redacted] IEP?

3. Did a change of placement occur with regard to [redacted] between the fall semester of 1989 and the spring semester of 1990

without proper notice or compliance with required procedural safeguards?

4. Is [redacted] receiving a language-based curriculum in all his classes pursuant to his IEP and, if not, what is an appropriate remedy?

5. Are [redacted] safety needs being met pursuant to his IEP and, if not, what is an appropriate remedy?

SCOPE OF REVIEW

The standard or scope of review to be applied in a state level review hearing is not specified by the Act, implementing federal regulations, or in the State Plan. However, it is apparent that the A.L.J. is to make an "independent" decision and is permitted to take additional testimony if necessary. 20 U.S.C. §1415(c) and (d); 20 C.F.R. §300.510; State Plan, Part II, VII.B.4.c and d. Such a review standard has been found not to be consistent with applying a substantial evidence test. Tompkins v. Forest Grove School District #15, 740 P.2d 186 (Or. App. 1987). Further, the federal courts have held that in their review of state level determinations under the Act, the substantial evidence test does not apply, but instead courts have discretion to give appropriate weight to the state level administrative findings. Town of Burlington v. Department of Education, Commonwealth of Massachusetts, 736 F.2d 773, 791-92 (1st Cir. 1984), aff'd. on other grds., 471 U.S. 359; Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981); Geis v. Board of Education of Parsipanny-Troy Hills, 774 F.2d 575 (3rd Cir. 1985). By analogy, the A.L.J. concludes she is similarly not bound by the substantive evidence test in reviewing the Amended Decision of the Hearing Officer in this matter.

The A..L.J. therefore concludes that in this review, independent factual determinations are to be made, giving appropriate deference to the findings of the Hearing Officer below. The findings of fact in this Decision upon State Level Review reflect the application of such a standard of review.

Because Dr. Tinker's June 1990 evaluation of [redacted] post-dates the due process hearing, findings on this issue reflect only the Administrative Law Judge's independent determination of these matters and involve no findings by the Hearing Officer.

FINDINGS OF FACT

1. Petitioner [redacted] was born on December 1, 1971. He was 18 years old at the time of the due process hearing. [redacted] has been identified by the District as having a "multiple/autism" handicap. Psychological evaluations of [redacted] diagnose him as having infantile autism and moderate to mild mental retardation.

2. Symptoms of autism include severe deficits in language development, peculiar speech patterns such as immediate and delayed echolalia (repeating words heard), and inability or substantial difficulties in interacting with people. Over the years [redacted] has exhibited each of these symptoms.

3. Beginning in 1983, [redacted] was placed in the ASIEP Program (Autistic Screening Instrument Program for Education Planning) developed and coordinated by Marcia Braden, M.S.

4. [redacted] remained in the ASIEP Program from 1983 apparently until 1987.

5. Between 1987 and March 1989 [redacted] shared his time between the ASIEP program and the SLIC (Significantly Limited Educational Capacity) program under a joint placement. As of March 1, 1989, [redacted] was placed exclusively in the SLIC program.

6. From 1984 through the spring of 1987 [redacted] attended District 11's North Junior High in Colorado Springs. From the fall of 1987 to the present he has been at District 11's Palmer High School, also in Colorado Springs.

7. In 1987, a triennial review of [redacted] educational placement[1] was conducted and resulted in the development of an IEP for [redacted] in April 1987. As pertinent to this case, the 1987 IEP lists as an annual measurable goal that [redacted] "continue in Special Olympics activities" as measured by staff observation, parent observation and recorded data charts.

8. [redacted] most recent IEP (which apparently followed the April 1987 IEP without any intervening IEP), was completed and signed on March 20, 1989. At that time it was agreed that [redacted] progress in the combination ASIEP/SLIC program warranted his graduation into the less restrictive SLIC program in March 1989. In the ASIEP program, students are taught on a one-to-one basis or in very small groups. SLIC students are taught in larger groups and are generally more advanced.

9. At the time [redacted] current IEP was developed placing him entirely in the SLIC program, SLIC classes at Palmer contained no more than nine or ten students. It was contemplated by [redacted] 1989 IEP developers that [redacted] graduation to the SLIC program would

result in his placement in classes having no more than ten students.

10. [redacted] current IEP, with its various addenda, was the subject of long negotiations between the parties over several dates in late 1988 and early 1989. Provisions of the 1989 IEP at issue in this proceeding include the following characteristics of service:

a. Establishment of an Interdisciplinary Team ("Monitoring Team") including current service providers and parent to establish consistent communication, develop instructional strategies, collect data, and to monitor [redacted] progress and learning style (page 4, paragraph 1).

b. [redacted] instruction was to develop functional skills in a variety of settings including work, classroom, home and community, with size of group listed as "individual" (page 4, paragraph 2).

c. Individual assistance was to be provided to [redacted] as necessary, as determined by the monitoring team (addendum, page 7, paragraph 14).

d. Attendance at school assemblies would involve integration with other regular education students (addendum, page 6, paragraph 8).

e. Retesting of street survival skills was to be administered by ASIEP coordinator, Marcia Braden (addendum, page 7, paragraph 16).

f. [redacted] was to have a language-based curriculum, with size of group listed as "individual" (addendum, page 5, paragraph 4).

g. [redacted] was to "continue in Special Olympics as a characteristic of service" (addendum, page 8, paragraph 19).

11. In addition, the current IEP contains, inter alia, the following other relevant provisions:

a. As an annual goal to be measured by teacher observation, [redacted] was to develop "safe, efficient orientation and mobility skills at 100%" (addendum, page 5, goals paragraph 7).

b. The IEP indicated that [redacted] had a need to increase his attending behavior in "large and small groups" (addendum, page 4).

12. Marcia Braden is an expert in the treatment and education of autistic children. Her ASIEP program, originally private in nature, has now been incorporated as a District 11 special education program. Braden currently functions as a coordinator for, and consultant to, the District concerning that program and as a consultant to the District for other special education matters. Braden has been directly involved in [redacted]' educational program since 1983 and was actively involved in the formulation of his current IEP. In addition, she was asked to function as a consultant on the Monitoring Team created by [redacted]' current IEP. Of the members of the Monitoring Team, Braden has the longest involvement with [redacted] education historically. Based on that experience and her expertise with autistic children generally, Braden is extremely knowledgeable about effective techniques to be used in assisting [redacted] learning.

13. Beginning in March 1989 and continuing through the summer of 1989, [redacted] was assigned a one-on-one aide, Carol Norris. Ms. Norris wrote in a traveling notebook as provided for in the IEP in which she communicated with [redacted] parents regarding his progress and other concerns regarding his education and safety. One of Norris' specific duties was to assure that [redacted] traveled safely to all his classes.

14. In the fall of 1989, Norris continued to be a full-time SLIC aide at Palmer High School and was assigned to [redacted] period 1, 3 and 5 classes. However, beginning in the fall of 1989 Norris no longer was [redacted]' one-on-one aide, and [redacted] had no aide specifically assigned to monitor his street crossing. Norris did, however, continue to be present on occasion when [redacted] attempted to cross streets and she periodically noted that [redacted] had difficulty in safely crossing the street. During these noted incidents [redacted] risked serious injury by failing to notice cars or to obey traffic lights while traveling across one or more busy streets to and from his adaptive physical education class.

15. In the fall of 1989 [redacted] parents were not informed that Carol Norris was no longer a one-on-one aide for [redacted] Norris continued to function as an aide generally in the SLIC program through the fall.

16. Norris was the only aide in the classroom assisting [redacted] during the 1989 fall semester. Among the duties performed by Norris in assisting [redacted] were the following:

a. Norris sat with [redacted] in math class on weekly test days to assist [redacted] in understanding the questions and to keep him on track while taking the tests.

b. Norris regularly assisted [redacted] in at least one additional subject by interpreting the language used by the teacher in words [redacted] could understand and by constantly cuing [redacted] to keep him from perseverating and to keep him on track.

17. The one-to-one functions performed in [redacted] classes in the fall of 1989 by Norris were necessary for [redacted] to obtain any significant educational benefit from the classes in question.

18. The ratio of teachers to students in [redacted] first semester 1989-90 classes ranged up to approximately 1 to 10 depending on the class. However, this number is somewhat misleading since Norris was regularly present in three of [redacted] classes, thereby lowering the staff to student ratio accordingly when she was present.

19. Beginning in late January, 1990, with the commencement of the second semester of the academic year, two changes took place within the SLIC program which had an impact on [redacted]. First, Carol Norris was laid off as an aide in the program, assertedly due to budgetary constraints. Second, [redacted] third and fourth period classes were combined utilizing a team teaching approach with two or three teachers. Math and social skills were taught in this combined course in a "community based curriculum." The idea behind this approach was to relate the curriculum more directly to real life situations and to provide the class with a larger block of time for taking intermittent field trips into the community. The combined third and four period class was taught largely in a lecture format and teaching and assignments in the class were the same for all students.

20. In [redacted] combined third and fourth period classes second semester, there were approximately 17 to 20 students. As a result of the team teaching approach there were two or three teachers in the combined classroom, technicially resulting in no drastic change from the first semester in the teacher/student ratio. (It should be noted that the third teacher in the combined classroom, when present, was occupied almost exclusively with a single severely handicapped ASIEP student. Therefore, neither that student nor the teacher can fairly be factored into the teacher/student ratio for the combined third and fourth period class). The staff/student ratio in the combined second semester class did vary significantly from the staff/student ratio for those periods of time when an aide was available first semester and was not available second semester.

21. On March 14, 1990, another aide replaced Carol Norris in the SLIC program as a full-time employee. The record does not clearly reflect what role this new aide had in assisting [redacted] in the second semester.

22. The second semester combined third and fourth period class met three days per week. On the other two days the classes met separately in smaller groups. Further, [redacted] schedule called for him to attend speech/language therapy during one hour of the combined class one day per week. As a result, [redacted] attended the combined third and fourth period class for five hours per week. Since [redacted] was scheduled for five academic periods per day (25 per week), this amounted to one-fifth of his total academic time.

23. To be beneficial to students, all special education programs must be individualized to meet the needs of the students for whom they are intended. In order to individualize an educational program it is necessary to assess the student's strengths, weaknesses and learning styles, and design a program including goals and characteristics of service specific to the student's articulated needs.

24. Depending upon an individual student's needs and the IEP developed for that student, it may be possible to deliver individualized education without significant amounts of one-on-one teaching in the classroom. On the other hand, some students may require regular or constant one-on-one attention for their educational program to qualify as individualized.

25. As with many autistic individuals, [redacted] auditory channel is weak and his visual channel is relatively stronger. [redacted] also has difficulty understanding abstract concepts and in generalizing concepts from one environment to another. [redacted] ability to understand and retain matters is erratic; materials that he knows and understands one day may be beyond his grasp the next day. In addition, [redacted] autism makes it difficult for him consistently to pay attention in his classes. As is typical of autistic individuals, [redacted] tends easily to lapse into perseverative behaviors such as repetitively tapping his hands on the table or removing and replacing the cap of his pen, while devoting much of his concentration to those behaviors. When [redacted] is engaged in perseverative behaviors of this nature he generally is not paying attention to what is being taught in class. Further, the longer [redacted] is permitted to continue such behavior, the more "spaced out" he becomes and the more difficult it becomes to pull him back into the classroom activity.

26. In order adequately to individualize [redacted] education, a number of matters must be accomplished. Among these, [redacted] must be monitored constantly in class to assure he is on track and not perseverating. Any perseveration must be immediately interdicted in a consistent manner. In addition, in order to maintain [redacted]

attention and overcome his verbal deficit, visual cuing and specialized written materials must be used as necessary; language employed must be of a type [redacted] can understand (e.g. concrete); and instruction must be provided with sufficient individual attention to enable him to benefit from the class. Further, assignments must be geared to his needs and assistance provided to him as necessary in completing those assignments.

27. In order effectively to assist [redacted] in decreasing his perseverative conduct so that he can benefit from his education, a behavioral program consistently administered by all his teachers is required. It is critical that staff members constantly monitor James and interfere as quickly as possible when perseverative behavior begins, reminding [redacted] to cease this conduct. Such interventions may be necessary as often as once a minute or even more frequently to keep [redacted] on task. Further, in order to assess the effectiveness of the behavioral program in place, teachers utilizing the program must collect objective data (e.g. the number of perseverative actions within a specified period of time and the number of interdictions required to stop such behavior), which data then must be analyzed.

28. The combined third and fourth period class in the second semester, with its greater number of students and concomitant increased activity, presented more distractions for [redacted] to deal with than his smaller classes do. As a result, [redacted] was more likely to lose his concentration in the larger class and to engage in perseverative behaviors.

29. [redacted] combined third and fourth period second semester class had at least four or five students requiring as much or more attention than [redacted] does. These students on various occasions occupied teachers in the class on a one-to-one basis leaving less time for [redacted] with individual teachers. Further, it is more difficult, generally, in a large class (of 17-20) than in small classes (of up to 10) to keep [redacted] on task, to give him individual attention, and promptly to interdict his perseverative behaviors, even when the staff/student ratios in the different sized classes are similar.

30. Because of the size of the combined third and fourth period class, the number of students requiring significant amounts of attention, and the lecture structure of the class, it was impossible for teachers in the class to constantly monitor [redacted] or to quickly detect and regularly interdict [redacted] perseverative conduct in the class.

31. In the combined third and fourth period class second semester [redacted] was not afforded individualized cuing, and language and assignments were not geared to his needs and level of understanding.

32. The combined third and fourth period class during the second semester of 1989-90 was not individualized for [redacted] educational needs because [redacted] was not monitored constantly; his perseverative behaviors were not quickly and consistently interdicted; he was not afforded individualized cuing; and language and assignments were not geared to his needs and level of understanding.

33. Because [redacted] combined third and fourth period classes second semester were not individualized, he received significantly less educational value from these classes than from his individualized classes.

34. [redacted] Monitoring Team met monthly, apparently in the spring of 1989 and throughout the fall of 1989. However, because of scheduling conflicts, Marcia Braden was unable to attend meetings or participate in the monitoring process on a consistent basis, and was not able to follow [redacted] program consistently despite her intended role as consultant to the District concerning [redacted] education.[2]

35. Although Braden designed a behavior program for [redacted] in connection with her consulting responsibilities for the District on the monitoring team, which behavior program was to be followed consistently by all of [redacted] teachers, Braden was unable adequately to monitor or assess how the program was functioning in part because of her inability to attend team meetings regularly and in part because of a lack of objective data.

36. Although Braden was merely a member of the monitoring team and not its coordinator, her extensive background with autism and her long acquaintance with [redacted] made her input especially valuable in accomplishing the objectives of the team as set forth in [redacted] IEP.

37. In monitoring team meetings that she did attend, Braden presented and explained the behavioral program she had designed for [redacted] which was intended to decrease his perseverative behaviors and increase his ability to attend in class. To be effective, this plan required consistent application by all of [redacted] service providers. However, for a period of time the program was not implemented consistently, particularly by one teacher. As a result, the potential effectiveness of the program was undermined for at least some period of time.

38. In monitoring team meetings that she did attend, Braden also requested, as a follow-up to her behavior program and for general assessment purposes, that objective data be collected by the classroom staff to monitor [redacted] behaviors and progress. However, this data collection, if done, was never reported to her. Braden herself visited [redacted] larger second semester combined third

and fourth period classes and noted an increase in his perseverative behaviors during those classes in comparison with the smaller ones. Likewise, data collected by [redacted] indicate that the staff was not able to detect and interdict those behaviors as frequently or as adequately in the combined third and fourth period second semester class as in small classes, and they did not do so.

39. Prior to the implementation second semester of a community based program during third and fourth periods with the team teaching technique, Braden was not informed of that change, either in terms of combining subject matter into a two-period class or in terms of the enlarged size of the class (from a maximum of 10 to a maximum of 20).

40. Prior to the implementation of the community based program during third and fourth periods, [redacted]. [redacted] was not informed that the class size of the combined subject matter class would increase over the size of [redacted] first semester classes.

41. Because [redacted]. [redacted] attended monitoring team meetings regularly without obtaining this information, it is reasonable to deduce that the team did not discuss this issue and did not develop instructional strategies for [redacted] to deal with this significant change.

42. The monitoring team as a group also did not discuss the issue of the loss of Carol Norris as an aide in the SLIC program or develop instructional strategies for [redacted] to deal with the loss of assistance from Norris.

43. The monitoring team required by [redacted]' IEP failed during the 1989-90 school year adequately to perform its functions as a result of a combination of factors, including Braden's absences and her inability regularly to participate in team deliberations and to follow [redacted] educational progress; the failure of the team timely and adequately to implement Braden's behavioral plan for [redacted], specifically the data collection and assessment aspects of that plan; and the team's failure adequately to plan for second semester changes with regard to [redacted] education, specifically the loss of an aide and the increase in class size during the third and fourth combined periods.

44. After receiving complaints from [redacted]. [redacted] in the fall of 1989 regarding the requirement that students cross one or more busy streets during rush hour to travel to adaptive physical education class in the gymnasium, the District's director of special education arranged to have students transported to that class in a bus. That step resolved the safety issue insofar as the physical education class, but was not designed to teach the students street-crossing skills.

45. [redacted] IEP sets a goal of [redacted] developing street-safety skills at 100% within one year and requires teacher observation to measure progress in this area. To comply with this provision of the IEP, the District must provide regular, consistent teaching, actual street-crossing practice, and observation of street-safety skills with data collection and feedback to the student and parents. Classroom teaching of these skills alone is insufficient. Furthermore, in light of [redacted] handicap and learning style, classroom teaching combined with only intermittent on-site teaching and observations during field trips would not satisfy this provision.

46. [redacted] [redacted] has withdrawn her permission to have [redacted] go on field trips with his community based classes since she is dissatisfied with the safety arrangements on those field trips in the absence of an aide to attend to [redacted] safety concerns.

47. Although at the beginning of the spring semester of the 1989-90 academic year, field trips for [redacted] class were apparently being taken with the whole combined third and fourth period group and without the assistance of an aide assigned to the class generally, by the middle of the semester most field trips were being taken with only half the class (approximately 8 to 10 students) with a teacher and an aide, resulting in a smaller staff to student ratio than was the case with the earlier field trips. There is no evidence in the record to support a finding that field trips with the lower ratio would be either unsafe or educationally unproductive for [redacted].

48. Whether [redacted] [redacted] withdrawal of permission for [redacted] to participate in field trips for safety reasons was objectively justifiable or not is not material to the question of whether the District provided [redacted] with adequate services to permit him an opportunity to achieve the IEP safety goal. These field trips alone could not satisfy the requirements of the IEP with regard to actual practice by [redacted] of safety skills and actual observation by teachers of his performance in this regard.

49. As a result of the unavailability of a teaching instrument, [redacted] was not tested for street survival skills in accordance with the requirement of his IEP. This test, despite its name, is a test of vocational skills.

50. [redacted] has been involved in the Special Olympics program for handicapped students for a number of years. Prior to the adoption of [redacted] 1987 IEP and then pursuant to the specific requirements of that IEP once it was adopted, the District provided the following services to [redacted] in connection with his Special Olympics participation: a District teacher attended Special Olympics events, monitored student participation, collected data

concerning that participation, coached the Special Olympics team and provided education-related input and observations to staffing meetings relating to the participating students. In addition, the teacher assisted parents with transportation to Special Olympics events and aided in assuring parents received notices of those events. Shortly after [redacted] arrived at Palmer High School, the teacher in question, who was apparently volunteering his time, left the District. The above Special Olympics services have not been provided to [redacted] by the District since early 1988.

51. It is and has been for some time the policy at Palmer High School to permit [redacted] release time for Special Olympics activities.

52. While Special Olympics is a characteristic of service in [redacted] IEP, the parties disagree on the meaning of the term "Special Olympics as a characteristic of service." Director of Special Education Ron Hage testified, based apparently on a rather vague memory of the events, that it simply means [redacted] can be excused from school to participate in Special Olympics. [redacted] [redacted] testified it was her understanding that [redacted] was to be entitled to a full panoply of services, similar to those provided to [redacted] until the beginning of 1988, including staff participation, transportation and data collection. The A.L.J. finds that when Special Olympics was made a characteristic of service of the IEP by means of a March 1, 1989 addendum, it was intended to be a meaningful provision which would add services not already being provided by the school to [redacted] (release time to attend). The A.L.J. therefore concludes that the Special Olympics provision in [redacted] 1989 IEP relates back to the prior level of services being provided by the District under [redacted] 1987 IEP and prior to that time. This conclusion is supported by [redacted] [redacted] clear memory of the events leading up to the formulation of March 1, 1989 addendum as well as by basic, logical considerations. The current IEP therefore entitles [redacted] to Special Olympics participation which will include adequate home/school communication; assistance with transporation as feasible; District staff member attendance at Special Olympics practices and Special Olympics events; and collection by the staff member of data concerning [redacted] participation. In addition the participating staff member should provide feedback concerning [redacted] participation at staff meetings.

53. [redacted] does not attend most assemblies because they are held seventh period while [redacted] is at work. Nevertheless, on those few occasions when school assemblies are held earlier in the day, [redacted] is seated with special education students exclusively. Regular education students are also seated in assemblies by class but apparently some of them intermix despite this seating arrangement. [redacted] only contact with regular education students in connection with school assemblies occurs when he walks in and out of the auditorium.

54. The evidence does not support a finding that any of [redacted] classes other than the combined third and fourth period second semester class were deficient in relation to the requirements of [redacted] IEP.

55. A language-based curriculum is one in which vocabulary used in everyday functions is woven into the curriculum and explained to the students. Although there was evidence that the second semester combined third and fourth period class was not individualized for [redacted] the evidence did not establish that the class lacked a language-based curriculum. Nor was there convincing evidence that [redacted] other classes lacked this curriculum.

56. Because of the difficulties in individualizing [redacted] education in the second semester large class setting, that setting was not appropriate for [redacted] or consistent with his IEP.

57. In order for [redacted] to benefit from his classes and for the requirement of individualization to be met, [redacted] requires one-on-one attention from an aide in certain classes (even small classes) at certain times, but not at all times or in all classes.

58. During the 1989-90 school year [redacted] did not receive the following services provided for in his IEP:

a. The monitoring team failed adequately to establish consistent communication; develop instructional strategies; collect data; and monitor [redacted] progress and learning styles.

b. [redacted] combined third and fourth period classes in the second semester were not individualized to meet his educational needs.

c. To the extent regular education students were permitted to seat themselves apart from their classes at assemblies, [redacted] was not integrated with regular education students at the assemblies he attended.

d. [redacted] was not retested in street survival skills.

e. [redacted] was not provided adequate services from the District with regard to Special Olympics.

f. In both the first and second semesters the District failed to provide a regular, safe and consistent means by which [redacted] could reasonably achieve the goal of learning street-safety at 100%.

59. At the beginning of the second semester Petitioner did not receive the statutory notice that would be required prior to a change in placement.

60. A psychological evaluation of [redacted] was performed in June of 1990, after the due process hearing in this matter. That psychological evaluation indicates [redacted] made gains both behaviorally and cognitively since his last evaluation in May 1988. However, to the extent that [redacted] higher test scores in June of 1990 represent true progress (rather than merely an aberration in the testing instrument and the fact that [redacted] had a better day this year during the testing than he did two years ago), such increase is not reasonably attributable to the educational program provided by the District. Such gains, to the extent they represent true improvement, occurred almost exclusively in parts of the tests which do not directly relate to school subjects, and are thus unlikely to be school-related at all. In any event, any true progess which may be reflected by the tests scores certainly cannot be specifically attributed to the educational program provided by the District during the second semester of the 1989-90 school year since the score increases occur over a two-year period.

61. The District had adequate advance notice of the matters asserted by Petitioner in this proceeding.

62. A review of the record in this matter reveals that both parties were afforded due process in the hearing below.

DISCUSSION

I. DISTRICT'S ISSUES ON STATE LEVEL REVIEW

1. Whether the Hearing Officer Erred in His Conclusions Regarding the Monitoring System.

The District argues the Hearing Officer improperly found that the monitoring team was dysfunctional and failed to fulfill the role assigned to it by the IEP. In particular, the District argues that the Hearing Officer gave too much weight to the role of Marcia Braden on the team and that it was improper to find the team was dysfunctional merely because Braden was not given adequate notice of the change to a larger group setting and because she was not able regularly to attend monitoring team meetings.

In conducting this review the A.L.J. has independently reviewed the evidence and has determined that the monitoring team failed adequately to fulfill the functions mandated for it in the IEP. This determination is based, in part, on the loss on various occasions of Braden's input into the team's deliberations, which input was significant given her expertise with autistic children and her longstanding role in [redacted] education. However, the determination is also based on other factors in the record, including the team's failure to assure adequate communication; delays in consistently implementing the behavior program designed by Braden, specifically a failure to assure data collection to assess [redacted] behaviors and progress; the team's failure to discuss and plan for two significant changes in the provision of educational services to [redacted] the loss of a full-time SLIC aide and the decision to double the size of the third and fourth period classes three days a week by combining those classes. These factors, taken as a whole, fully support a determination that the monitoring team, while functioning, did not adequately perform the tasks defined for it in [redacted] IEP: that is, providing "consistent communication, developing instructional strategies, data collection and monitoring progress and learning styles." Particularly with regard to the significant changes that occurred in [redacted] education in the second semester, the team's failure to communicate with all members, and to consider and plan for these changes, along with the team's ongoing failures in such areas as assuring adequate data collection, constituted a major breakdown of the team's intended function, in violation of [redacted] IEP.

2. Whether the Hearing Officer Erred in His Conclusion That There Was a Failure to Individualize [redacted] Education in His Combined Third and Fourth Hour Class Second Semester.

The District asserts that the Hearing Officer's reasoning in determining that there was a failure to individualize [redacted] education was flawed. Specifically, the Hearing Officer found that lack of individualization resulted because the monitoring team was not advised of the proposed second semester changes and thus did not develop strategies to cope with these changes. The District argues that in fact the team was aware of the proposed changes in advance and discussed them, and supports this argument with excerpts from monitoring team minutes which the A.L.J. has ruled were never entered into evidence in the hearing and which the A.L.J. has therefore declined to consider.[10/] This is contrasted with the evidence in the record indicating that neither [redacted] [redacted] nor Marcia Braden had any advance information regarding the class size change. This evidence strongly suggests that this information was not discussed at the team meetings which were regularly attended by [redacted] [redacted] (if not Braden). Thus, the weight of the evidence supports the findings of the Hearing Officer in this regard.

The District also argues the Hearing Officer erred in determining there was a failure by the team to collect data. However, nothing in the record supports the District's position in this matter. The record indicates that the data to be collected was objective data, such as how many perseverative behaviors were noted in a given period of time and how many interdictions were required. The record contains no evidence that any such data was

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collected and reported to Braden and, in fact, supports the opposite conclusion.

The District further argues that the Hearing Officer gave too much weight to the testimony concerning class observations by [redacted] [redacted] and Braden in determining whether the combined third and fourth period class second semester was individualized for [redacted] In fact, however, there was substantial evidence in the record from the teachers themselves to support a finding of lack of individualization in this class, and the Hearing Officer's implicit determination that the observations of [redacted] and Braden were valid, is entitled to due deference. In addition, such a conclusion is supported by an independent review of the record by the Administrative Law Judge. For example, the evidence establishes the class was largely a lecture format with the same content to all students and without visual cuing specific to [redacted]. Assignments (worksheets) were also the same for all students and language was not geared to [redacted] comprehension level. In addition, even the teachers admitted that large classes resulted in more distractions for [redacted] and that it was more difficult to identify and quickly interdict [redacted] perseverative conduct in a large class. Furthermore, the fact that some assignments which [redacted] could not complete at all in the large class during class time (when he was expected to do so) were later gone over with [redacted] in a smaller class does not establish that the large class was individualized for [redacted], as the District seems to assert; quite the opposite is true.

In short, the record clearly supports a finding that there was no individualization in the combined third and fourth period class during second semester for the reasons stated by the Hearing Officer in his Amended Decision and the additional reasons found by the A.L.J. herein. This determination is not altered by the fact that the IEP indicates a need to increase attending in large and small groups. The drafters of the IEP contemplated classes of no more than ten students when they included this provision. Further, as the testimony indicated, merely placing [redacted] in a large group, without proper educational strategies and methods, would do nothing to increase [redacted] attending behavior in large groups. Whether a large group setting could, in the abstract, be appropriate for [redacted] is really not the issue here; the large group setting provided in this case by the District failed to provide individualization and thus violated the provisions of [redacted] IEP in this regard.

3. The District's Role in Special Olympics is not a Violation of [redacted] IEP.

The District argues that no violation of [redacted] IEP occurred with regard to Special Olympics and no remedy relating to Special Olympics is appropriate. It is the District's position that the March 1, 1989 addendum to [redacted] IEP must be construed as merely requiring the District to provide release time for [redacted] to attend Special Olympics sessions. In contrast, Petitioner argues the addendum was intended to provide [redacted] with the full range of services that were provided to him under his prior IEP, including, inter alia, District 11 Staff participation, supervision and data collection relating to Special Olympics events and student participation in them, integration of data into educational assessments, as well as assistance in providing transportation.

The Hearing Officer did not definitively decide this issue in his Amended Decision and the A.L.J. must make an independent decision in this regard.

Only three people were involved in the March 1, 1989 addendum decision, and only two of those individuals, Ron Hage and [redacted], testified. Ron Hage, who is Director of Special Education for the District, demonstrated only a vague memory of the meetings in which the issue of Special Olympics was raised and decided. In contrast, [redacted] [redacted] memory was quite specific and detailed. Furthermore, the District's position that the addendum should be construed so as to provide no actual services to [redacted] other than release time (which "service" he had already had been receiving) is not logically sound and is inconsistent with prior events concerning this issue.

[redacted] [redacted] testified that shortly after [redacted] came to Palmer the District ceased to provide services previously provided at North Junior High under then-current IEP and prior to that IEP. She further stated that beginning shortly after [redacted] arrived at Palmer and continuing during the development of the current IEP, she continued to press the District to provide these services in connection with the 1987 IEP and then in context of negotiating a provision to that effect in the current IEP. The District did not dispute this testimony and did not dispute that from 1988 on it provided no Special Olympic services to [redacted] other than release time for attendance at Special Olympic events, which "service" was apparently available generally for special education students.

[redacted] [redacted] had no success in her efforts regarding Special Olympic services in the context of the prior IEP and initially was unsuccessful in obtaining the sought after provision in the new IEP. In fact, an addendum to the current IEP dated November 21, 1988, details this disagreement between [redacted] [redacted] and the District and indicates that only Adaptive Physical Education (and not Special Olympics) would be a characteristic of service in the IEP. However, there is no evidence that this provision of the IEP altered the District's on-going policy of allowing [redacted] release time for Special Olympics events and the A.L.J. has concluded such a policy, in fact, continued.

In light of this history, the District's interpretation of the March 1, 1989, Special Olympics addendum renders that addendum essentially meaningless, since under that interpretation the District was merely agreeing to continue [redacted]' release time which appears never to have been at issue between the parties at all. Thus, there was no reason for the parties to add a provision intended to be so limited.

Moreover, an expansive interpretation of the provision is supported by the language of the provision itself which refers to "characteristics of service" by the District. Allowing [redacted] to leave school to attend Special Olympics, without more, hardly constitutes a "service". In addition, the language of the current IEP addendum is identical to the Special Olympics provision in [redacted] 1987 IEP, strongly suggesting that the parties intended the level of services provided under the old IEP to be provided again. Finally, the intent of the parties to provide services at the level provided in 1987 under the prior IEP is confirmed by minutes of the March 20, 1989 monitoring team meeting (at which both Ron Hage and [redacted] were present). These minutes state: "Previous IEP's have included provision for [redacted] [[redacted]] to participate in Special Olympics. We will continue in the same fashion. Adaptive P.E. is a carryover with Special Olympics." While these minutes are not part of the IEP, they are certainly valuable in determining the intention of the parties.

The A.L.J. concludes that the current IEP requires the District to provide Special Olympic services at the level provided to [redacted] while at North Junior High and for a short time at Palmer High School under the 1987 IEP. Specifically, the District is required to provide staff member participation in Special Olympics by a person qualified in special education and physical education, including attending practices and Special Olympics events, participating in or providing input to staff meetings, ensuring adequate home/school communication and assisting in transportation as feasible.

4. Remedy Number 1 of the Hearing Officer's Decision was Unnecessary or is Moot.

The District argues that Remedy Number 1 (relating to determining whether [redacted] can function in a large group) was unnecessary because there were no violations of the IEP or, in the alternative, such remedy is moot because the District has assured Petitioner such large group classes will not be part of [redacted] IEP in the future. The A.L.J. believes it is appropriate to enter an order relating to class size consistent with the District's assurances to Petitioner. Such order is discussed and set forth infra.

5. The District Is In Full Compliance With [redacted] IEP and Therefore Any Ordered Remedy Would Be Inappropriate.

The A.L.J. has determined violations of the IEP were established. Appropriate remedies are discussed and set forth infra.

II. PETITIONER'S ISSUES ON CROSS-APPEAL

1. A Determination of Whether [redacted] Safety Needs are Being Met is Not Related to the Outcome of the Street Survival Test.

Petitioner asserts the evidence establishes [redacted] safety needs and goals as provided by the IEP were not being met by the District once Carol Norris's one-on-one assistance in street crossing was removed in the fall of 1989. The A.L.J. has concluded that substitutes offered by the District to assist in meeting the IEP safety goals (intermittent field trips and in-class safety training) were inadequate reasonably to assist [redacted] in meeting the IEP annual safety goal of safe, efficient orientation and mobility skills at a 100%, and therefore the District failed to comply with this aspect of [redacted] IEP in the 1989-90 fall and spring semesters. Moreover, the record reflects that the Street Survival Skills Test which is provided for in the IEP is in fact a vocational skills test, not a street safety test. Therefore, the Hearing Officer's reliance in his decision on the outcome of the street survival test to determine whether the IEP safety goal is being met and to assess what action should be taken if it is not being met, was misplaced. Appropriate remedies with regard to the safety goal are discussed infra.

2. The District's Failed to Provide a Language-Based Curriculum for [redacted] in Violation of His IEP.

The Petitioner argues the District failed to provide a language-based curriculum for [redacted] in violation of his IEP. The Hearing Officer did not definitively rule on this issue; however, the A.L.J. has concluded the evidence fails to support this contention.

3. Appropriate Remedies For IEP Violations.

Appropriate remedies for the IEP violations which have been proven are discussed below.

4. Change of Placement

Petitioner argues the changes in services provided to [redacted] in the second semester of 1989-90 school year constituted a change of placement, triggering statutory rights to notice and procedural guarantees. The District argues no change of placement occurred and that any change of placement that did occur was justified by legitimate budgetary constraints on the District. Because the A.L.J. has concluded [redacted] IEP has been violated, it is unnecessary to reach the change of placement issue since appropriate relief as requested by Petitioner may be obtained solely from a determination of the IEP violation.

III. APPROPRIATE REMEDY

1. Availability of Compensatory Relief

Petitioner argues that the District's failure to comply with his IEP entitles him to prospective remedies and compensatory services. The District asserts that there has been no proof of regression on the part of Petitioner and he is therefore not entitled to compensatory services for a violation of his IEP. The A.L.J. disagrees.

The Act provides each handicapped student with a basic floor of educational opportunity (a Free Appropriate Public Education). Board of Education of East Windsor Regional School District v. Diamond, 808 F.2d 987 (3rd Cir. 1986). A state provides this free appropriate public education and satisfies the requirements of the Act by providing a handicapped student with (1) access to specialized instruction and related services, (2) which are individually designed, (3) to provide educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176 (1982). Further, to qualify as a free appropriate education, such education must be provided in conformity with the child's IEP. 20 USC §1401 (18)(D). Thus, any significant (that is not de minimis) deviation from an IEP constitutes a violation of the Act. For such violation Petitioner is entitled to relief, including compensatory services as appropriate. See, 20 USC 1415(e)(2); Burlington School Committee v. Department of Education, 471 U.S. 359 (1985); Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986). The A.L.J. concludes that where, as here, violations of the IEP were substantial (as with the failure to provide Special Olympics services) and/or impacted significantly on the amount of educational value the student received from his education (as with the failure here to individualize the third and fourth period class, to adequately provide safety training, and to provide other services), a full panoply of remedies is available to Petitioner regardless of whether a quantifiable amount of regression is proved.

2. Propriety of the Compensatory and Prospective Relief Sought by Petitioner.

Petitioner has enumerated certain specific relief sought in this matter, but in certain cases has failed to provide an adequate evidentiary basis in the record for her requests. The District has not responded directly to any of Petitioner's requested relief, but merely argues Petitioner is entitled to none.

Petitioner requests that Marcia Braden, or a person of comparable qualifications, be retained by the District as a consultant to set up and supervise a remedial educational program for [redacted] The A.L.J. concludes that requiring the District to hire such a consultant is neither necessary nor appropriate under the facts of this case and declines to order such relief.

In addition, Petitioner requests the following specific remedies to be included in a remedial educational program for [redacted]

1. Development and implementation of written language-based curriculum in all subjects. The A.L.J. has determined the evidence failed to establish language-based curriculum was not provided to [redacted] Therefore, this relief is not appropriate and is not ordered.

2. Data collection. The evidence did establish a failure to collect objective data to determine whether [redacted] behavior program was effective, and relief with regard to this issue is appropriate.

3. Participation in Special Olympics. The evidence established a failure to provide Special Olympics as a characteristic of service as provided by the IEP, and relief is appropriate as to this issue.

4. Street Survival Testing. The evidence established a failure to provide this testing as required by the IEP and the relief requested by Petitioner is appropriate.

5. Home Tutoring. Petitioner seeks 120 hours of home tutoring in functional academics with particular attention to math and social skills. The A.L.J. assumes this is intended as a compensatory remedy for failure during the spring semester of 1989-90 to individualize [redacted] combined third and fourth period classes involving math and social skills. The evidence did establish James failed to receive an individualized education in this class through the spring semester. However, the evidence does not specifically support all the details of the relief sought by Petitioner, and the relief order omits these specifics.

6. Reinstatement of an Aide for Street Safety. The evidence establishes [redacted] failed to receive regular on-site monitoring and instruction in street safety skills for much of 1989-90, and relief concerning this issue appropriate.

7. Full Time Aide. Petitioner seeks an aide to assist [redacted] on a full-time basis at school and at work whose responsibilities will be reduced only with permission of the requested consultant and consensus of the staffing team. The evidence does not support the need for full-time aide but does

support the need for an aide at certain times to adequately individualize [redacted] education as required by his IEP. Therefore, some relief with regard to this issue is appropriate.

8. Class Size. Petitioner seeks an order that [redacted] be placed in a class with no more than ten students, together with one teacher and an aide. The District indicates that it has already agreed not to place [redacted] in large classes. The A.L.J. accepts this as a stipulation of the parties that James' classes will be limited to 10 students (the maximum size of SLIC classes contemplated by the monitoring team when the IEP was drafted). The evidence does not support a requirement that an aide must be present in all of [redacted] classes to comply with the individualization requirement of [redacted] IEP. A determination of the need for an aide in any given class must be made by staffing teams based on such factors as size of class, nature of students and their needs, subject matter and teacher.

9. Assemblies. The issue of assemblies was not directly addressed by either party on appeal. However, the remedy ordered by the Hearing Officer below is supported by the record.

CONCLUSIONS

1. The District has violated [redacted] [redacted] current IEP in that:

a. The monitoring team failed adequately to establish consistent communications; develop instructional strategies; collect data; and monitor [redacted] progress and learning styles.

b. [redacted] combined third and fourth period classes in the second semester were not individualized to meet his educational needs.

c. To the extent regular education students were permitted to seat themselves apart from their classes in assemblies, [redacted] was not integrated with regular education students at the assemblies he attended.

d. [redacted] was not retested in street survival skills.

e. [redacted] was not provided adequate services from the District with regard to Special Olympics.

f. In both the first and second semesters the District failed to provide a regular, safe and consistent means by which [redacted] could achieve the goal of learning street safety at 100%.

2. This is the final decision on State-level review, State Plan, Pt. B., VII.B.4.D.

DECISION

In order to compensate [redacted] [redacted] for the violations of his IEP during the 1989-90 school year, the District shall provide the following:

1. Data Collection. Within 14 days of the date of this decision, a staffing or meeting of the monitoring team shall be held at which time a specific plan will be designed for the collection, reporting and assessment of objective data covering [redacted] attending behavior in all [redacted] classes, which plan shall thereafter immediately be implemented in each class. Such data collection shall implement the behavior plan for [redacted] developed by Marcia Braden to increase his attending behavior, which plan was in effect in whole or in part during 1989-90.

2. Special Olympics. Effective as soon as possible but in any event no later than October 15, 1990 the District shall provide for [redacted] (but not necessarily for [redacted] individually) staff member participation in Special Olympics by a person qualified in special education and physical education. Said staff participation shall include attending Special Olympics practices and events; participating in staff meetings or providing input for such meetings concerning [redacted] participation in Special Olympics; insuring adequate home/school communication, and assisting with transportation where feasible.

3. Street Survival Testing. Street Survival testing will be performed as soon as possible during the 1990-91 fall semester. If no appropriate test is available one will be developed by the District or an agreed upon substitute assessment procedure will be found.

4. Compensatory Relief With Regard to 1989-90 Spring Semester Combined Third and Fourth Period Math and Social Skills Class. Beginning as soon as possible but not later than October 15, 1990, the District shall provide [redacted] with math and social skills instruction for the equivalent of five hours per week for one semester, to be provided on an individualized basis in supplementation to [redacted] current curriculum, accommodating his scheduled activities as provided in his IEP. This instruction

shall be designed to compensate [redacted] for the failure to individualize his instruction in his 1989-90 second semester combined third and fourth period classes.

5. Aide for Safety Issues. Beginning as soon possible but no later than October 1, 1990, the District shall provide regular, individualized monitoring, observation and training for [redacted] in street crossing, safety and mobility skills. Such assistance shall continue throughout the 1990-91 academic year, or for such lesser time as it takes [redacted] to accomplish the street crossing safety and mobility goal in his IEP.

6. Classroom Aide. At a staffing or monitoring team meeting to be held at no later than 14 days from the date of this decision, a specific agreement shall be reached as to the amount of one-on-one aide time [redacted] requires in his classes during the fall semester of 1990-91 to adequately individualize his education pursuant to his IEP, which agreement shall be implemented immediately thereafter. If no agreement can be reached at said meeting, [redacted] shall be entitled during the fall semester of 1990-91 to the same amount of one-on-one aide time in equivalent subjects that he received during the fall semester of 1989.

7. Class Size. For at least the fall semester 1990-91, [redacted] shall be placed in classes with no more than 10 students.

8. Assemblies. The District shall assure that [redacted] is treated consistently with all other students during attendance at school assemblies; that is, if those students are seated by class, [redacted] shall be seated with his class, and if those students are seated by choice, [redacted] shall have the opportunity to choose his seat also.

DONE AND SIGNED this

7th of September, 1990

Judith F Schulman

JUDITH F. SCHULMAN,
Administrative Law Judge

FOOTNOTES

[1] The State Plan is prepared by the Colorado Department of Education, as required by the Act, to implement the provisions of the Act. 20 U.S.C. §1413.

[2] An Individual Education Program is a written statement concerning each handicapped child, designed for the unique needs of the child and including, inter alia, a statement of present levels of functioning, measurable educational goals, needs, and services. 20 U.S.C. §1401(19); 34 C.F.R. §300:340 et. seq.; State Plan, Pt. II., V.

[3] The Amended Findings and Decision is the applicable document in this appeal.

[4] 20 U.S.C. §1415(c).

[5] Pt. II., VII.B.4.

[6] Deadlines for filing clarified issues on appeal and the cross appeal were extended by the A.L.J. in light of the issuance of the Hearing Officer's Amended Decision and the lack of specific procedure in the State Plan for filing cross appeals.

[7] In the interest of clarity, the designations of the parties as Petitioner ([redacted]) and Respondent (District) used during the due process hearing is continued in this state level review proceeding.

[8] A triennial review is required pursuant to the State Plan.

[9] Although the record is not explicit on this point, it appears that Braden also functioned on the team as the behavioral consultant required by [redacted] IEP.

[10] Any event, the A.L.J. notes that the excerpts of minutes quoted by the District in its brief and sought by the District to be admitted into evidence do not support the District's position that the team was ever made aware of or discussed a proposed change in class size for the second semester. The minutes merely reflect an understanding that the subject matter would be combined and resulting larger blocks of time would facilitate community-based education and field trips. The cited portions of the minutes certainly do not reflect any attempt to develop instructional strategies to assist James in coping with larger classes, thus evidencing either a lack of information by the team of the intended class size change or a failure to fulfill that aspect of the team's IEP obligations requiring the team to develop such strategies. The cited portions of the minutes also reflect no discussion of or planning for loss of the full time SLIC aide beginning second semester.

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** to: Sarah J. Christensen, Esq. 805 South Cascade Ave., Colorado Springs, Colorado 80903; to Nancy Westmoreland, Esq. 104 South Cascade Ave., No. 204, Colorado Springs, Colorado 80903; and to Fred Smokoski, Assistant Director of Special Education, Colorado Department of Education, 201 East Colfax Ave., Denver, Colorado 80203 by depositing same in the U.S. Mail, postage prepaid, in Denver, Colorado, on this 10th day of September, 1990 .

D. Garcia

Secretary to Administrative Law Judge

Case Number: 90:505

Status: Complaint Findings

Key Topics: Extended School Year (ESY)
Free Appropriate Public Education (FAPE)

Issues:

- Whether the ESY Guidelines issued by the Colorado Department of Education violate the law because they state that the purpose of ESY programs is not to enable a handicapped student to learn or to enhance new skills, but to prevent serious regression of previously learned skills.
- Do districts' policies that comply with the Colorado Department of Education's policy violate the law?
- Did districts' actions regarding the provision of ESY services to students within those jurisdictions deny the students FAPEs?

Decision:

- Policy that establishes a regression/recoupment standard for ESY services is legal and ensures that handicapped students in Colorado receive a FAPE.
- District policies which follow state policy guidelines likewise, comply with the law.
- District's failure to make individual determination of eligibility did violate law but actions undertaken to remedy situation.
- District's failure to individually determine duration of ESY services violated the law.

Discussion:

- Evolution of case law and federal administrative opinions relating to ESY.
- Rowley case does not stand for the proposition that states and local school districts must provide educational programming beyond the academic school year to handicapped students which is calculated and designed to enable the student to learn and enhance new skills.
- Consideration of individual needs in ESY determination.

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Cont'd

- Description of services offered in two districts.
- Description of procedures used in two districts to determine ESY eligibility and notify parents of the availability of services.

FEDERAL COMPLAINT NUMBER [redacted] 90:505
FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Officer, Colorado Department of Education (CDE) on March 26, 1990. An Amended Complaint was filed on April 10, 1990.

2. The complaint was brought by the Association for Retarded Citizens in Boulder County and the Association for Retarded Citizens in Colorado against CDE, St. Vrain Valley School District RE-1J, and Boulder Valley School District No. RE-2 on behalf of the handicapped children served by those entities.

3. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of 20 U.S.C. 1221e -3(a)(1) and is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. 76.780 et seq., and Colorado State Board of Education Policy No. 1280.0.

4. The complaint was brought against CDE and the districts as recipients of federal funds under the Education of the Handicapped Act, 20 U.S.C. 1400 et seq., as amended (the Act).

5. It is undisputed that CDE and the districts are the recipients of federal funds for the purpose of providing a free appropriate public education to eligible handicapped students under the Act.

6. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

7. As set forth in the letters of acceptance dated April 5, 1990, it was agreed by the parties to the complaint that the Complaints Officer would undertake the investigation of this matter under the supervision of Deputy Commissioner Richard A. Laughlin.

8. The sixty day timeline allowed by 34 C.F.R. 76.781(a) within which to investigate and resolve this matter expires on May 24, 1990.

9. The investigation of the complaint included a review of the documents submitted by the parties, various states' education policies, and other relevant information. It included a consideration of relevant case law and federal agency opinion letters.

II. ISSUE No. 1

A. STATEMENT OF THE ISSUE

The first issue investigated was whether or not CDE has violated and continues to violate 20 U.S.C. 1412 by issuing guidelines and directives pertaining to extended school year (ESY) programs which prevent handicapped children from receiving a free appropriate public education under the provisions of the Act, in that the guidelines state that the purpose of ESY programs is not to enable a handicapped student to learn or to enhance new skills, but to prevent serious regression of previously learned skills.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16),(17),(18) and (19) and 1412.

34 C.F.R. 300.1, 300.2, 300.4, 300.13, 300.14, 300.110, 300.121-122, 300.130, 300.148, 300.300, 300.340 - 341 and 300.346.

State Plan Under Part B of the Education of the Handicapped Act As Amended by Public Law 94-142, Sections II and V(E) and Appendix F.

C. FINDINGS

1. CDE has been and continues to be a recipient of a grant award pursuant to Part B of the Act from the United States Department of Education during all times relevant to the complaint.

2. A condition for receipt of a Part B grant award is that CDE have in place a state plan that has been approved by the United States Department of Education.

3. On June 22, 1988, CDE submitted to the U.S. Department of Education the Fiscal Year 1989-91 State Plan Under Part B of the Education of the Handicapped Act As Amended By Public Law 94-142 (State Plan). It was

accepted and approved on approximately August 18, 1988.

4. Complainants allege that the Guidelines: Extended School Year and Administrative Guidelines contained in Appendix F, and approved as part of the State Plan, violate the Act in that they are designed to prevent handicapped children within the state from receiving a free appropriate public education pursuant to an individualized education program designed to meet their unique needs.

5. The purpose of ESY services is stated in the documents as follows:

> The purpose of extended school year services is not to learn or to enhance new skills, but to prevent serious regression of previously learned skills.

6. The guidelines contain the following eligibility statement:

> Extended school year services should be provided when it is determined from historical data, documented clinical or classroom observation, or other objective evidence that the regression of already learned skills will reach a point that the time spent in recoupment of learned skills detracts from the teaching of new skills.

7. Nothing in the Act itself or its rules and regulations, found at 34 C.F.R. 300.1 et seq., addresses the issue of ESY. There are no standards established in the laws or rules for the provision of ESY services nor are specific circumstances described which would define when a child needs ESY services.

8. The recognition that certain handicapped students might require services beyond a traditionally established academic year was set forth in the seminal case of Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), modified and remanded sub nom. Battle v. Commonwealth, 629 F.2d 269 (3rd Cir. 1980), on remand, 513 F. Supp. 425 (E.D. Pa 1980), cert. den. sub. nom., Scanlon v. Battle, 101 S.CT. 3123 (1981). While the court in Armstrong was addressing particular types of needs for students with certain categories of handicapping conditions, its holding has generally been applied to any handicapped student. The Court found that a handicapped student under the Act is entitled to an educational program in excess of the traditional academic school year if regression caused by interruption in educational programming, together with the student's limited recoupment capacity, would significantly jeopardize the

benefits accrued to the student during the school year. See also Alamo Heights Independent School District v. Board of Education, 790 F. 2d 1153 (5th Cir. 1986) and Crawford v. Pittman, 708 F.2d.1028 (5th Cir.1983).

9. There are no Colorado court decisions relevant to this matter.

10. The United States Department of Education, Office of Special Education Programs (OSEP) has published policy letters on ESY issues. While not binding on states or local education agencies in the sense a court decision might be, they are significant as administrative responses to issues posed to the agency charged with administering the programs under the Act. Further, the interpretations may serve as standards to be applied to a state or local school district by the federal government in a compliance review setting.

11. On December 8, 1989, OSEP stated in the Myers Letter, 16 EHLR 290, "OSEP recognizes that a child's IEP for ESY services will probably differ from the child's regular IEP, since the purpose of the ESY program is to prevent regression and recoupment problems." (at 291, emphasis in original). In an earlier response to an inquiry, Myers Letter, 13 EHLR 213:25, 8/30/89, OSEP recognized that it was the responsibility of the IEP staffing team to determine on an individualized basis a student's need for ESY services and that most states used a standard of regression/recoupment to make this determination. OSEP found such a standard to be in line with Part B of the Act.

12. The Office of Civil Rights (OCR), of the United States Department of Education has also issued opinions on ESY issues in the context of its various enforcement activities under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended. It appears to be OCR's position that regression/recoupment is a permissible standard to use in determining a handicapped student's eligibility for ESY services and that the availability of services cannot be limited to services needed for self sufficiency. See: Mesa Public Schools, 16 EHLR 316 (OCR 11/9/89).

13. The United States Supreme Court addressed a number of issues regarding the provision of a free appropriate public education to handicapped students under the Act in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). Contrary to complainants assertions, the Rowley decision does not stand for the proposition that states and local school districts must provide educational programming beyond the academic school year to handicapped students which is calculated and designed to

enable the student to learn and enhance new skills. Rowley, by its own terms, was a narrow decision based upon a specific, and perhaps unique, factual situation. There is no authority nor argument presented to enable an interpretation of Rowley as complainant suggests.

14. Cases in other jurisdictions that expand eligibility requirements beyond regression/recoupment considerations appear to turn on specific requirements of state law or on particular fact situations presented by a given case.

15. ESY services are different from either summer school or compensatory services, the latter being services which might be offered to a student who had not received any benefit from the services provided pursuant to an IEP during the traditional school year.

16. Complainants contention that CDE's policy and guidelines must contain a statement that ESY services are available to students who are not otherwise receiving educational benefit during the school year is not supported by current law or administrative interpretation.

17. A policy which establishes a regression/recoupment standard for the provision of ESY appears to be in line with relevant legal authority and agency interpretations.

18. In addition to relying on a regression/recoupment standard for ESY eligibility, the CDE guidelines do the following:

    a) state that all students identified as handicapped under the Act be considered for ESY services;
    b) provide that local staffing committees make ESY eligibility determinations;
    c) affirm that ESY services are to be offered at no cost to the student or parent;
    d) state that the provision of ESY services shall be guided by the IEP document;
    e) require that the scope and duration of ESY services be determined on an individual basis by the staffing committee;
    f) provide that LRE considerations should be discussed by the staffing committee;
    g) allow that ESY services may include both special education and special education related services; and

h) prohibit local districts from using budgetary constraints as a reason not to provide ESY services.

19. The guidelines contain nothing to suggest that the burden of showing a student is eligible for ESY services rests with the student or the student's parent, guardian or representative.

20. The ESY guidelines document is not binding on local school districts except to the extent that districts must operate within the general outlines established by the State Plan as a condition of receipt of funds under the Act. Districts are encouraged to develop their own local policies to address ESY programs. Boulder's policy, for example, contains eligibility requirements within the parameters of the State Plan plus it allows for additional matters to be considered, such as prolonged illness, in making an eligibility determination for ESY. There is no legal requirement that a state ESY policy specifically require that local school districts consider certain other enumerated criteria, such as the nature of a student's handicapping condition or the severity of a student's handicapping condition, when the policy sets forth that IEP staffing teams consider the individual student's needs. Consideration of an individual student's needs, of necessity, would include discussion of any other attendant factors required to make a reasoned decision. See: Lee v. Thompson 1982 - 83 EHLR 554:429 (D.Hi).

21. The state guidelines do not limit the category of students eligible to receive services, the duration of services, the type of services to be provided, the amount of regression that needs to exist to be eligible for ESY, the amount of time needed to recoup lost skills nor the type or sufficiency of evidence used to demonstrate regression. There are no restrictions on districts making an individual determination regarding a student's need for ESY services.

22. Rather than denying handicapped children in the state a free appropriate public education based on an individual education plan, the provisions of the guidelines set forth above serve to assure that the students will receive a free appropriate public education that meets each individual student's needs. The guidelines allow for honest professional assessment of the needs of each individual student.

D. CONCLUSIONS

The Guidelines: Extended School Year and Administrative Guidelines issued by CDE comply with the Act's requirements regarding the provision of a free appropriate public education, including extended year services, to handicapped students within Colorado. Therefore, CDE is not in violation of either the Act or its implementing rules and regulations.

III. ISSUE No. 2

A. STATEMENT OF THE ISSUE

The second issue investigated was whether or not Boulder Valley Public Schools RE-2 (Boulder) has violated the assurances given in its application for funding pursuant to 20 U.S.C. 1414 by failing to provide handicapped children within its jurisdiction with a free appropriate public education as alleged by the following:

1) The duration of educational programming to meet each student's individual needs is not being determined;
2) The duration of programming to meet each student's individual needs is not in all cases being determined during the individualized educational plan process, nor supported by any evaluation or assessment data or other information;
3) Students who may have otherwise been determined to need extended year services are required to finance such programming themselves, or through their parents;
4) Students who may have otherwise been identified as needing extended year services are not receiving a specially-designed program to meet their unique needs, but are receiving, at the student's own cost and expense, recreational programming;
5) Students who are offered extended year services are not receiving specially-designed instruction to meet their unique, individual needs;
6) The district's expressed policy is to provide extended year services only to student's who experience serious regression of previously learned skills and who require an unreasonable period of time to recoup these skills.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16),(17),(18) and (19) and 1414.

34 C.F.R. 300.1, 300.2, 300.4, 300.13, 300.14, 300.180, 300.235, 300.340 - 341, 300.346 and 300.349.

State Plan, Sections II and V(E) and Appendix F.

C. FINDINGS

1. At all times relevant to the complaint, Boulder was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to Boulder, in part, based, on the assurances contained within the application.

3. One of the assurances made by Boulder was that, in accordance with the Act, it would provide a free appropriate public education to each handicapped child within its jurisdiction including special education and related services to meet the unique needs of that child.

4. In September 1988, Boulder adopted its Policy For Extended School Year Services and ESY Guidelines. Both documents remain in effect as of this date.

5. The policy and guidelines include among their provisions the following:

   a) All students identified as handicapped under the Act, regardless of handicapping condition, will be considered for ESY services;
   b) Consideration for ESY services will occur at the annual or triennial review;
   c) The stated purpose of ESY services is to prevent serious regression of previously learned skills which would jeopardize the educational benefits accrued to the student during the regular school year for a student who cannot easily regain or recoup those skills;
   d) Parents/guardians are an integral part of the decision making process regarding ESY;
   e) A data collection system will be utilized to assist in ESY determinations;
   f) Any unique circumstances of a particular student that indicate a need

for ESY will be considered;

g) ESY services are offered at no cost to the parent or guardian;

h) A variety of service delivery options are to be considered for ESY;

i) Determination is to be made on an individual basis as to the amount and duration of ESY services offered to a student; and

j) Absences and continuous lack of progress may be considered in determining a student's needs for ESY.

6. Further, in a staffing meeting the burden is not on a parent, guardian or representative to show evidence of regression/recoupment problems for a student to be considered eligible for ESY.

7. For the reasons set forth in Section II Issue No. 1 Part C. Findings, the policy and guidelines adopted by Boulder are in compliance with the Act's requirements regarding the provision of a free appropriate public education to handicapped students within the district's jurisdiction. Complainants contention that the district's policy and guidelines must contain a statement providing that ESY services are available for students who are not otherwise receiving educational benefit during the school year is not supported by current law or administrative interpretation. A student who is not receiving educational benefit from his IEP is entitled to a staffing meeting to develop an appropriate IEP and may be in need of compensatory or remedial services, which are different from ESY services.

8. Given that Boulder's policy and guidelines comply with the law, the next level of inquiry is whether or not it has failed to follow its policy and guidelines, as alleged by complainants.

9. Complainants provided information about 29 students served by Boulder during the 88-89 school year relative to the services offered or not offered to the students during the summer of 1989.

10. Complainants state that in 17 instances, the issue of ESY was not discussed. In each case, the parent, guardian or representative was of the opinion that the student needed additional programming beyond the current school year. Of these 17 students, it appears 11 students attended the Expand Program and paid a registration fee.

11. The Expand Program offers an Adventure Summer Day Camp for severely-profoundly handicapped students. The program is operated by Boulder City Parks and Recreation. The school district provides funding for the Day

Camp through a grant under Chapter 1, Part D, Subpart 2, Programs for Handicapped Children under the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2791, as amended (formerly known as the Education Consolidation and Improvement Act of 1981). The city matches the amount of funds paid by the district, plus charges a registration fee for each student. The district's funds are used to provide staff for the program, including occupational therapists and specialists in emotional/behavioral disabilities.

12. Four students about whom complainants provided information were found eligible for ESY services based upon data indicating regression/recoupment difficulties. All received individually determined services for six weeks duration. One student attended the Expand Program without payment of the registration fee because the program provided the ESY services found to be necessary to prevent the regression/recoupment problems previously experienced by the students. The parents, guardians and representatives of each of these students were of the opinion that the students needed additional or different programming.

13. For the remaining students, there was some discussion of eligibility for ESY services and the students were not found to be eligible. Six of those students attended the Expand Program and paid a registration fee. In the opinion of the parents, guardians, or representatives of those students, each needed additional programming. No documentation which demonstrated the eligibility of the students under the district's policy and guidelines was offered to support this opinion.

14. On September 18, 1989 the policy and guidelines, as well as ESY Data Collection System sheets, were distributed to all special education teachers and discussed.

15. Also in September, a new ESY documentation form was added to annual review packets distributed to all special education staff to be put into use beginning November 6, 1989. The form is to be used at all annual or triennial reviews to document that a student's eligibility for ESY is considered and to summarize the data available regarding the student's regression and recoupment of skills. The form also requires documentation of the eligibility discussion and of the rationale for whatever decision is reached. Further, documentation of the options considered is required, as well as an outline of the services to be offered, and a description of the location and the duration of services for those found eligible.

16. On November 28, 1989, the Director of Special Education distributed a comprehensive informational packet on ESY, including sample forms, to the members of the special education staff.

17. On December 5, 1989, the Director of Special Education sent a memorandum to all special education staff reminding them to observe and document regression and recoupment of skills for their students following the winter break.

18. Similar memos were sent by several special education coordinators to the teachers around the time of spring break.

19. In January, recruitment of paraprofessionals to provide ESY services was begun.

20. On February 26, 1990 a workshop was held on ESY for special education coordinators.

21. On April 20, 1990, the Director of Special Education mailed to the parent and/or guardian of each special education student served by Boulder a copy of the ESY policy and guidelines and a narrative explanation of what ESY is and how eligibility is determined.

22. During at least ten weekly meetings of special education coordinators over the course of the school year, the ESY policy and guidelines and their implementation were discussed.

23. Documentation provided relating to staffings during the current school year shows that in the majority of cases, a student's eligibility for ESY services was discussed. In those few instances where there was no discussion, restaffings have been scheduled for May, 1990.

24. Documentation provided by the district shows that, while some staffings are still scheduled for the next few weeks, approximately 30 to 35 students to date have been found to be eligible for ESY services this coming summer. The services to be offered vary according to the individual's needs. There is no evidence of a pattern or practice to offer services only for 1/2 day, 5 days per week for a six week duration. There is evidence that the scheduling and provision of ESY services varies according to student need.

25. With regard to the students who attend the Expand Program, as both parties stated, they may not be charged for any services for which they are eligible under Boulder's policy and guidelines for ESY and students who will receive ESY services at the Expand Program this summer are not being charged for those services.

D. CONCLUSIONS

1. Boulder's policy and guidelines comply with the Act's requirements regarding the provision of a free appropriate public education, including ESY services to handicapped students within the district's jurisdiction.

2. The fact that there was no discussion for a group of students of their eligibility for ESY services in 1989 did violate each student's right to a free appropriate public education in accordance with an individual education plan based on each student's unique needs. However, during the 1989-90 school year, Boulder has undertaken numerous steps to insure that parents and staff are informed of the availability of ESY services for eligible students, that staff are trained to document regression and recoupment problems, that ESY eligibility is considered at annual and triennial reviews, that ESY eligibility is determined based on an individual's unique needs within the parameters of the district's guidelines, that ESY is offered at no cost to eligible students and that programs offered are of the intensity and duration required by the needs of an individual student.

3. The district has implemented a reasonable plan for assuring that the ESY policy and guidelines will be fully implemented during the summer of 1990, and for assuring that what happened during the summer of 1989, when there was no discussion of ESY services for some students, does not reoccur.

4. There is no evidence that the district is currently in violation of the provisions of the Act and its implementing regulations.

E. RECOMMENDATIONS

1. The district will submit to the Complaints Officer on or before October 15, 1990 a summary report on the provision of ESY services during the summer of 1990. This report will contain the following information:

a) Student name or identification number
b) Primary handicapping condition
c) Short statement of basis for eligibility determination
d) Description of services provided
e) Location of service provision
f) Frequency and duration of service provision
g) Service Provider
h) Cost to student of services

2. The district will also include in the report information on any requests made on behalf of any students for a due process hearing on the issue of provision of ESY services.

VI. ISSUE No. 3

A. STATEMENT OF THE ISSUE

The third issue accepted for investigation was whether or not St. Vrain Valley District RE-1J has violated the assurances given in its application for funding pursuant to 20 U.S.C. 1414 by failing to provide handicapped children within its jurisdiction with a free appropriate public eduction under the provisions of the Act as alleged by the following:

1) The duration of educational programming to meet each student's individual needs is not being determined;
2) The duration of programming to meet each student's individual needs is not in all cases being determined during the individualized educational plan process, nor supported by any evaluation or assessment data or other information;
3) Students who may have otherwise been determined to need extended year services are required to finance such programming themselves, or through their parents;
4) Students who would have otherwise been identified as needing extended year services are not receiving a specially-designed program to meet their unique needs. Students who have been offered extended year services are offered not more than a one-half day, four days per week program of six weeks' duration, on an arbitrary basis and not with the intent of providing handicapped students within the district specially - designed instruction to meet their unique needs.

5) The district's administrative guidelines/directives regarding extended school year services offer services only to students who experience serious regression of previously learned skills and require an unreasonable period of time to recoup these skills.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16),(17),(18) and (19) and 1414.

34 C.F.R. 300.1, 300.2, 300.4, 300.13, 300.14, 300.180, 300.235, 300.340 -341, 300.346 and 300.349.

State Plan, Sections II and V(E) and Appendix F.

C. FINDINGS

1. At all times relevant to the complaint, St. Vrain was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to St. Vrain in part based on the assurances contained within the application.

3. One of the assurances made by St. Vrain was that, in accordance with the Act, it would provide a free appropriate public education to each handicapped child within its jurisdiction including special education and related services to meet the unique needs of that child.

4. In September 1988, St. Vrain adopted an ESY procedure as part of its Special Services Policies and Procedures Handbook. The handbook is a compilation of administrative procedures adopted to implement the Comprehensive Plan for Special Education. The procedure remains in effect as of this date.

5. The ESY procedure contains the following provisions:

   a) All students identified as handicapped under the Act are to be considered eligible for ESY services;
   b) The determination of eligibility is to be made by a staffing committee at any meeting called to discuss a student's IEP;

c) Those students suspected by staff to be eligible for ESY services should have early reviews to provide time for appropriate summer planning by parents and staff;

d) The purpose of ESY services is not to learn or enhance new skills but to prevent serious regression of previously learned skills to the point that recoupment of previously learned skills interferes with learning new skills;

e) Student data regarding regression and recoupment is to be compiled after school breaks, holidays or absences;

f) Separate IEPs are to be written for ESY services including goals and objectives; and

g) Certain coordination activities are to take place between the referring teachers and ESY staff.

6. Further, there is no provision in the ESY procedure that places the burden of proving a student's regression/recoupment problems on the student's parent, guardian or representative.

7. For the reasons set forth in Section II Issue No. 1 Part C. Findings, the procedures adopted by St. Vrain, generally, are in compliance with the Act's requirements regarding the provision of a free appropriate public education to handicapped student's within the district's jurisdiction.

8. Complainants contention that the district's procedure must contain a statement providing that ESY services are available for students who are not otherwise receiving educational benefit during the school year is not supported by current law or administrative interpretation. A student who is not receiving educational benefit from his IEP is entitled to a staffing meeting to develop an appropriate IEP and may be in need of compensatory or remedial services, which are different from ESY services.

9. The wording of St. Vrain's procedure does suggest that staff members can unilaterally determine which students may be appropriately referred for ESY services although, conversely, it recognizes the role of a staffing team in making a decision as to eligibility. St. Vrain did confirm it was district practice that ESY staffings were scheduled only for students referred by staff based on the staff's documentation of regression/recoupment experiences. In other words, St. Vrain used the correct standard to determine eligibility and served eligible students pursuant to correctly developed IEPs but did not correctly involve the staffing team in the eligibility determination. Clarification is needed to accurately establish that the staffing team for each

student, which includes the student's parent or guardian, makes the ESY eligibility determination at the annual or triennial review regardless of when it occurs during the year. The determination will take into consideration the staff's regression/recoupment documentation but one staff member does not make a decision unilaterally. Students deemed eligible for ESY can be restaffed in May to develop appropriate ESY IEPs.

10. Complainant provided information regarding 15 students served by St. Vrain during the 1988-89 school year relative to the services offered or not offered to the students during the summer of 1989.

11. Complainant states that in seven instances there was no discussion of the student's eligibility for ESY services. In each instance, it was the opinion of the parent, guardian, or representative that the student was in need of programming beyond the traditional school year. District documentation indicates no regression/recoupment problems were noted for these students during the 1988-1989 school year.

12. Of the eight remaining students, complainant states that one received privately financed tutoring and the remaining seven received ESY services for 1/2 day,4 days a week for no more than 6 weeks. In each instance, it was the opinion of the parent, guardian or representative that the student's needs were not met by the services received and the student was in need of additional programming.

13. The district provided documentation from approximately 24 student files, including a number of those surveyed by complainants. In the majority of cases, there was specific data in the students' files regarding regression/recoupment issues. Additionally, in a number of cases, ESY services were offered based on a teacher's or parent's subjective opinion as to the student's regression/recoupment experiences.

14. In the documents provided, there was evidence to indicate that a student's individual needs determined the nature of ESY services offered. However, the students uniformly were offered services for 1/2 day, 4 days per week for a 6 week period of time. Indeed a March 11, 1988 memo indicates ESY services would be offered during the summer of 1988 from 8:00 A.M. to noon, 4 days a week for seven weeks. A May 10, 1989 memo states that 1989 summer services would be from June 21 to July 27. There was no documentation to demonstrate that a determination as to the duration of services was made on an individual basis.

15. There was no evidence that St. Vrain made a practice of placing the burden on a student's parent, guardian or representative to demonstrate a student's eligibility for ESY services.

16. There was no evidence that students who were eligible under the district policy were required to pay for ESY services.

17. On October 4, 1989, a memorandum was issued to special education staff reminding them to document any regression that occurred over the summer break and which might occur after upcoming school holidays.

18. On January 19, 1990 another memorandum was sent to special services staff reminding them of the requirement that regression be documented in order to refer a student for ESY services.

19. A memo sent on March 28, 1990 reminded staff to submit a tentative list for ESY referrals and to document regression/recoupment. The staff is specifically directed not to withhold the names of any students who may meet the criteria as appropriate programs will be developed to meet each student's needs.

D. CONCLUSION

1. With one exception, St. Vrain's procedure complies with the Act's requirement's regarding the provision of a free appropriate public education, including ESY services, to handicapped students within the district's jurisdiction. That section of the procedure dealing with staff referrals for ESY should be clarified to indicate that staffing teams, including parents, should discuss the potential eligibility for ESY services of each handicapped student.

2. The district does collect data to document regression/recoupment experiences of students and has taken appropriate steps during the current school year to assure that staff fulfills this requirement of the procedure. Students who meet the eligibility standard are offered ESY services.

3. The district makes individual determinations based on a student's unique needs in developing an ESY program for that student except that all student's are offered programs of the same length, frequency, and duration regardless of a student's individual needs, in violation of the Act.

4. The fact that there was no discussion by a staffing team for a group of students as to their eligibility for ESY services in 1989 was a procedural violation of each student's right to a free appropriate public education in accordance with an IEP based on each student's unique needs. However, there is evidence to suggest these students did not meet the regression/recoupment standard for ESY eligibility established by the district.

5. The district's offer to add a reference to ESY in the checklist used by staffing teams to guide their discussions is accepted.

6. The district's offer to develop an appropriate written notice form regarding ESY services that is to be sent to all parents or guardians of handicapped students served by the district is accepted.

E. RECOMMENDATIONS

1. On or before June 15, 1990, the district will develop and mail to all parents or guardians of handicapped students served by the district a notice explaining the district's procedure for and delivery of ESY services with a copy being sent to the Complaints Officer.

2. On or before June 15, 1990, the district will submit information to the Complaints Officer on all students eligible for ESY services for 1990 showing that an individual determination was made as to the length, frequency, and duration of services to be offered.

3. On or before October 15, 1990, the district will clarify its procedure with respect to the referral of students for ESY services and the discussion of potential eligibility for ESY services for all handicapped students and submit a copy to the Complaints Officer.

4. On or before October 15, 1990, the district will revise its staffing team checklist to include a reference to ESY and submit a copy of the checklist to the Complaints Officer.

5. The district will submit to the Complaints Officer on or before October 15, 1990 a summary report on the provision of ESY services during the summer of 1990. This report will contain the following information:

    a) Student name or identification number
    b) Primary handicapping condition
    c) Short statement of basis for eligibility determination
    d) Description of services provided
    e) Location of service provision
    f) Frequency and duration of service provision
    g) Service Provider
    h) Cost to student of services

6. The district will also include in the report information on requests made on behalf of any student for a due process hearing on the issue of provision of ESY services.

7. On or before January 15, 1991, the district will submit copies of IEPs developed in staffing meeting's held between October 15 and January 15 that verify that ESY discussions were held for all handicapped students not just those referred by staff. The exact number of IEPs to be reviewed will be agreed upon between the Complaints Officer and the district based upon the actual number of staffings held during that time.

Dated this 24th day of May, 1990

Cheryl M Karstaedt
Cheryl M. Karstaedt
Colorado Department of Education
Federal Complaints Officer